No. 06154 2007

IN THE

Supreme Court of the United States

CHARLES A. NICHOLS,
Petitioner,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was error for the court below, in conflict with the Federal Employers' Liability Act ("FELA"), decisions of this Court construing the Act, and other federal and state court decisions, to affirm the trial court's reduction of the jury's award of damages caused by the railroad's negligence based on answers apportioning between petitioner's "condition" and a "pre-existing condition"?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1, petitioner states that the parties listed in the caption are the only parties to the proceedings in the court below whose judgment is sought to be reviewed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Charles A. Nichols, prays that the Supreme Court grant a writ of certiorari to review the judgment of the Colorado Court of Appeals affirming the trial court's use, in a FELA case seeking damages for aggravation of latent pre-existing conditions, of a special verdict form containing questions regarding petitioner's asymptomatic pre-existing conditions. After reducing the jury's award of damages to reflect the jury's finding of comparative negligence, the trial court reduced the jury's general damage award—already accounting for pre-existing conditions as mandated by the court's jury instructions—a second time based on the answers to those questions.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reported at 148 P.3d 212 and reproduced as Appendix B. The entry of judgment of the Denver County District Court is not reported, and is reproduced as Appendix A.

JURISDICTION

The judgment of the Colorado Court of Appeals as to which review is sought entered on March 23, 2006. The Court of Appeals denied a timely petition for rehearing on May 25, 2006. On December 18, 2006, the Colorado Supreme Court denied a timely petition for writ of certiorari, making the Court of Appeals' decision the final state court judgment. On February 13, 2007, Justice Breyer extended the time for filing this petition to and including May 17, 2007. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"), are reproduced at Appendix E.

The Seventh Amendment to the United States Constitution provides in pertinent part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

STATEMENT OF THE CASE

The decision below decided an important question of federal law involving the administration of FELA injury claims in a manner flatly contrary to prior decisions of this

Court, resulting in a violation of petitioner's Seventh Amendment right to trial by jury and disunity in the federal common law of FELA that will lead to unequal treatment of injured workers depending on where a claim is brought. The question raised by the decision below should be settled by this Court to assure the Act's continuing authority in all courts and the uniformity of governing law.

I. FELA: Statutory Enactment, Purpose, and This Court's Stewardship.

In response to mounting concern about the number and severity of injuries suffered by railroad employees, Congress preempted state tort remedies by enactment of FELA in 1908 to provide a compensation scheme for railroad employee workplace injuries. *Second Employers' Liability Cases*, 223 U.S. 1, 53-55 (1912). Unlike typical workers' compensation schemes, which provide relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence: "[E]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." 45 U.S.C. § 51, Appendix E at 22a.

Congress designed FELA to "shif[t] part of the 'human overhead' of doing business from employees to their employers." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (quoting *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58 (1943)). "[T]o further [the Act's] humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Gottshall*, 512 U.S. at 542. FELA "abolished the fellow servant rule," "rejected the doctrine of contributory negligence in favor of . . . comparative negligence," "prohibited employers from exempting themselves from [the] FELA through contract," and, in a 1939 amend-

ment, "abolished the assumption of risk defense." *Id.* at 542-543; *see* 45 U.S.C. §§ 51-55.

FELA Section 56 provides for concurrent jurisdiction between state and federal courts, but FELA actions are governed, substantively, by federal law. *See Chesapeake & Ohio R. Co. v. Stapleton*, 279 U.S. 587, 590 (1929). Governing law is given "uniform application throughout the country essential to effectuate [FELA's] purpose," *Dice v. Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 361 (1952), superseding the liability as determined by the several states. *See Second Employers' Liability Cases*, 223 U.S. 1, 54 (1912). The supremacy clause of Art. VI of the Constitution charges this Court "with assuring the act's authority in state courts." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943).

Absent express statutory departures from the common law, the requisite negligence under FELA is founded on the common law concepts of negligence "as established and applied in the federal courts." *Urie v. Thomson*, 337 U.S. 163, 174 (1949) (citation omitted). "It has long been settled that questions concerning the measure of damages in a FELA action are federal in character," *Norfolk & W. Ry. V. Liepelt*, 444 U.S. 490, 493 (1980), and "the propriety of jury instructions concerning the measure of damages in a FELA action is an issue of 'substance' determined by federal law." *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

FELA is remedial and should be construed so as to advance the remedy given by Congress rather than to narrow it. *See Hoepfner v. Northern Pac. Ry. Co.*, 61 F.Supp. 819, 822 (D. Mont. 1945). The Act is liberally construed in favor of injured railway workers, *see Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985), and this purpose must be kept in mind when confronting arguments which would restrict an employer's liability. *See Baker v. Baltimore & Ohio R. Co.*, 502 F.2d 638, 641 (6th Cir. 1974). FELA's

provisions are to be interpreted consistent with the principle that they impose a greater duty on the carrier to respond in damages for injuries than the common law they supplant. *See Rogers v. Missouri Pacific R. R. Co.*, 352 U.S. 500, 506-507 (1957); *Escher v. Norfolk and W. Ry. Co.*, 397 N.E.2d 9, 12 (Ill. App. 1979), *aff'd*, 411 N.E.2d 864 (1980). The Act affords the jury, as fact finder, greater leeway in determining the fact and extent of liability. *See Rogers*, 352 U.S. at 508-509; *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir. 1976); *Escher*, 397 N.E.2d at 12.

Historically, this Court has jealously guarded FELA's remedial intent. *See H.T. Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361 (1957) ("The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for '* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'") (citing *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)).

Time and again this Court has directed that courts may not invade the province of the jury by substituting their view of the facts in FELA cases for that of the jury, and has repeatedly granted certiorari review "because of the importance of preserving for litigants in FELA cases their right to a jury trial . . . ." *Wilkerson v. McCarthy*, 366 U.S. 53, 55 (1949) (collecting cases). In *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943), the Court stated:

> [The right to trial by jury] is *part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.* [H]owever inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

(emphasis added).

In *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), for example, this Court restored a verdict set aside for lack of evidence on the issue of causation, stating that "[i]t is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . It is the jury, not the court, which is the fact-finding body. . . . That conclusion, whether it relates to negligence, causation *or any other factual matter*, cannot be ignored." (internal citations omitted; emphasis added). *See also Davis v. Baltimore & Ohio R.R. Co.*, 379 U.S. 671 (1965); *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *H.T. Arnold*, 353 U.S. at 361 (rejecting claimed conflict between jury answers and verdict, stating that interpretations of evidence in the name of local practice that nullify federal rights cannot be accepted).

"[T]rial by jury is part of the [FELA] remedy." *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. at 360. FELA vests the jury with complete discretion on the factual issue of liability. *See Texas & Pacific Ry. Co. v. Roberts*, 481 S.W.2d 798, 800 (Tex. 1972); *Cummings v. Ill. Cent. R. Co.*, 269 S.W.2d 111, 116 (Mo. 1954). Absent an award so excessive or inadequate as to shock judicial conscience and raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, a jury's fact determination of damages is inviolate. *See Metcalfe v. Atchison, T. & S.F. Ry. Co.*, 491 F.2d 892, 898 (10th Cir. 1974).

More recently, in *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135 (2003), this Court once again underscored FELA's "overall recovery facilitating thrust" in forbidding courts from impinging on the province of the jury by apportioning damages to non-party, non-railroad causes without "textual warrant" in the Act. In doing so, the Court noted that "the Act expressly directs apportionment of responsibility between

employer and employee based on comparative fault. The statute expressly prescribes no other apportionment." *Id.* at 161.

II. Factual Background and Procedure Below.

In November 1999, petitioner Charles A. Nichols (plaintiff below), a Colorado resident and locomotive engineer employee of the Burlington Northern and Santa Fe Railway Company ("BNSF"), fell 10 feet to the road bed while attempting to board a locomotive for a work assignment and sustained permanent and totally disabling injuries to his lower back and right knee in aggravation of later-discovered pre-existing, but asymptomatic, conditions in those areas of his body.

In June 2000, petitioner, whose injuries occurred in Colorado, brought this FELA action against BNSF in state court, asserting claims for negligent work assignment based on the November 1999 accident and a claim for unrelated cumulative injuries to his upper back and neck.

In June 2001, on the eve of a scheduled jury trial, the trial court granted BNSF's motion for summary judgment, dismissing petitioner's claims as time-barred by FELA's three-year statute of limitations. Petitioner appealed, and on August 1, 2002, the Colorado Court of Appeals reversed the judgment of dismissal and remanded the case for trial on the merits. *Nichols v. Burlington No. & Santa Fe Ry. Co.*, 56 P.3d 106 (Colo. App. 2002).[1]

On September 15, 2003, petitioner's FELA claim for negligent work assignment proceeded to trial by jury.[2] At the conclusion of a four-day trial, the parties stipulated to all

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[1] Petitioner has not reproduced this opinion in the Appendix because the issues presented in that appeal have no bearing on this proceeding.

[2] Petitioner's cumulative injury claim, separate from the claim at issue here, settled prior to trial.

instructions to be given. There is no issue in this case as to whether the jury instructions given accurately stated the law. Those instructions directed the jury to find damages only for injuries sustained in the November 1999 accident *caused by the railroad's negligence*, exclusive of any amount for a "pre-existing condition" not caused by the railroad. Appendix H at 41a-42a, 50a, 52a, 54a-55a (Instructions 5, 24, 28, & 33).

The parties did, however, disagree as to what interrogatories FELA law permitted to be asked in the special verdict form. Petitioner objected to the inclusion in the form of any special interrogatories concerning pre-existing conditions or mitigation of damages and to the wording of the form tendered by BNSF on the ground that, while the jury may account for pre-existing conditions in reaching the general damages verdict in a FELA case, asking for a percentage allocation of such conditions in a special interrogatory and the court's reduction of a general verdict based on the jury's response would be error. Appendix F at 28a.

Over petitioner's objections, the trial court decided to use defendant's Special Verdict Form B. Appendix A at 4a-6a. In answer to Questions 1-5 of the form, the jury found causative negligence on the part of both parties, and assessed 70% to BNSF and 30% to petitioner. Question 6 then asked for the only damage calculation performed by the jury.

> 6. [W]hat amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury?
>
> ANSWER: $800,000

Appendix A at 5a. Following the jury's findings on the ultimate fact issues of liability and damages, the verdict form continued with the questions objected to by petitioner in the instruction hearing, answered by the jury as follows:

7. [I]s all or part of Plaintiff's *condition* attributable to *a pre-existing condition*?

ANSWER: Yes (Yes or No)

8. [W]hat percentage of Plaintiff's *condition* is attributable to a *pre-existing condition*?

ANSWER: 70%

9. Did Plaintiff fail to mitigate his *damages*?

ANSWER: No (Yes or No)

10. [W]hat amount of . . . *damages* expressed in dollars *as determined in response to Question No. 6* do you find could have been avoided . . . had [Plaintiff] taken reasonable steps to mitigate his *damages*?

ANSWER: $___ (line left blank)

Appendix A at 5a-6a (emphasis added).[3]

After receipt of the verdict and discharge of the jury, petitioner orally requested that judgment enter in the amount of $560,000 (the total damages awarded reduced by the 30% comparative negligence finding). The trial court declined to enter judgment at that time and directed the parties to submit briefs on the issue of whether the jury's award should be reduced only once by the 30% comparative negligence finding or yet again by the 70% answer to Question 8.[4] In his Motion for Entry of Judgment and brief (Appendix G), Petitioner objected to any reduction of the jury's award other than for comparative negligence.

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[3] While inclusion of Questions 9 and 10 in the verdict form was clearly error, the jury's "No" answer to Question 9 mooted this error for lack of prejudice. Counsel for petitioner have found no case, pattern jury instruction, or verdict form suggesting that damages should be apportioned for a plaintiff's failure to mitigate in this manner.

[4] The trial court's call for briefing on the effect of the jury's answers to Questions 7 and 8 indicates uncertainty in the court's mind as to why the questions were asked in the first instance.

After considering the briefs, the trial court issued its order on September 22, 2003 denying plaintiff's motion for entry of judgment. Appendix A. After reducing the damage award by 30% for comparative negligence, the court reduced that net amount again by the 70% answer to special verdict form Question 8. Appendix A at 3a. Relying on *Sauer v. Burlington No. R. Co.*, 106 F.3d 1490 (10th Cir. 1996), the court concluded that not to reduce the award again based on the answer to Question 8 would ignore the jury's "complete findings." Appendix A at 2a. Judgment entered on the jury's $800,000 verdict in the twice-reduced amount of $168,000.[5] Petitioner appealed, seeking entry of judgment in the amount of $560,000. Appendix J.

Though recognizing that the special verdict form and jury instructions viewed in combination were "not models for future use," the Court of Appeals concluded that the reduction of damages based on Questions 7 and 8 was not error. Appendix B at 14a. In what it termed an attempt to "reconcile" the jury's answers based on the record and the instructions, the court concluded that "the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the engineer's negligence or for pre-existing conditions." Appendix B at 15a. The court based this conclusion on the placement of the pre-existing apportionment question after the total damage question and on the notion that two negatives make a positive—that Question 6 did not instruct the jury not to reduce for a "pre-existing condition." *Id.* Based on these considerations, the court rejected an interpretation that the $800,000 number represented damages caused only by the railroad's negligence, already reduced by amounts, if any, attributable to pre-existing conditions, reasoning that if such

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[5] The actual amount of final judgment was $164,950.86, reflecting an undisputed credit to BNSF. For simplicity of reference, petitioner refers only to the $168,000 round number without deduction by the offset.

were the case, the jury's assessment of total damages (before reduction for pre-existing or comparative negligence findings) must have been $2.5 million, an amount that the court found the record could not sustain.[6] Appendix B at 16a. The court concluded that "the jury did not adjust the compensation amount reflected in the response to question six based on its determination of the relative effect of pre-existing conditions and the railroad's negligence." *Id.*

Petitioner's Motion for Rehearing was denied. Appendix C. Petitioner sought certiorari review of the decision in the Colorado Supreme Court, which request was denied. Appendix D. The federal character of these issues was raised in the trial court, the Court of Appeals, and the Colorado Supreme Court. *See* Appendix D, F, G, J, K, & L.

REASONS FOR GRANTING THE PETITION

The decision as to which review is sought decided important questions of federal law in a manner that deprived petitioner of his Seventh Amendment right to trial by jury in a FELA case in conflict with a long line of governing decisions of this Court construing the Act. This Court has repeatedly declared that FELA's remedial intent and the right of injured workers to trial by jury do not permit a seeming conflict in jury findings to deprive a FELA verdict winner of a damages award if those findings are susceptible to any possible view that reconciles them. *Nichols* evidences a troubling disregard of these repeated mandates. This important question of federal law has not been, but should be, settled by this Court in continued exercise of its stewardship of FELA claims.

Further, the decision below has created a conflict with decisions of other state courts that have been called upon to address the propriety of including questions in special ver-

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[6] The record in this case will show that the Court of Appeals' finding of fact on this point is incorrect. *See* Appendix K (petition for rehearing).

dict forms asking for specific findings regarding pre-existing conditions. The decision, a published opinion as to which certiorari review was denied by Colorado's highest court, will inevitably find currency and drive up the transaction costs of every FELA case for employees, employers, and federal and state judicial systems alike by forcing trial and appellate courts to wrestle with this issue in FELA cases involving pre-existing conditions.

Review is necessary to assure FELA's "uniform application throughout the country essential to effectuate its purposes." *Dice*, 342 U.S. at 361. The decision for which review is sought will result in inconsistent treatment of injured employees depending upon the jurisdiction in which their cases happen to be tried. As discussed below, a FELA plaintiff in another state, postured identically to petitioner in this case, would have received a $560,000 award, while Mr. Nichols received only $168,000. Such result defeats the core purpose of FELA—to create a consistent body of federal law to govern injury actions by railroad workers against their employers.

I. THE COURT BELOW MADE NO ATTEMPT TO RECONCILE THE JURY'S ANSWER TO QUESTION 8 WITH ITS AWARD OF DAMAGES CONTRARY TO RULING DECISIONS OF THIS COURT.

Over many decades, this Court has jealously guarded injured railroad employees' right to trial by jury by repeatedly holding that courts may not, consistent with the Seventh Amendment, impinge on the jury's role in the trial of FELA actions. *See, e.g.*, *Davis*, 379 U.S. 671; *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963); *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. 355; *H.T. Arnold*, 353 U.S. 360; *Rogers*, 352 U.S. 500; *Schulz v. Pennsylvania Rd. Co.*, 350 U.S. 523 (1956); *Wilkerson*, 336 U.S. 53 (collecting cases); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Tennant*, 321

U.S. 29; *Bailey*, 319 U.S. 350; *Tiller*, 318 U.S. 54. The *Rogers* Court stated this imperative well in these words:

> Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention *by granting certiorari to correct instances of improper administration of the Act* and to prevent its erosion by narrow and niggardly construction.
>
> * * *
>
> *Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination.*

Rogers, 352 U.S. at 509-510 (emphasis added).

Particularly instructive in this proceeding is *Gallick*, 372 U.S. 108, in which the Court explicated the analytical procedure that courts must follow when faced with a perceived inconsistency between the jury's answers to special interrogatories and a jury's verdict on liability and damages.

Petitioner in *Gallick*, a spotting crew foreman, was bitten by an insect while working on a stretch of railroad right-of-way near a stagnant pool of water, the existence of which the railroad had been aware for many years. *Id.* at 110. Infection developed from the bite. *Id.* Resistant to medical treatment, the infection worsened over time resulting in severe injuries to the foreman. *Id.* Following trial, answering some 24 questions submitted under a state special verdict statute, the jury found in favor of the foreman on liability and damages, and the trial court entered judgment on the verdict. *Id.* at 112.

The railroad appealed, and the Ohio Court of Appeals set aside the judgment based on its conclusion that there was a failure of sufficient proof as to causation. *Id.* at 112-113.

This Court granted certiorari "to consider the question whether the decision below improperly invaded the jury's function." *Id.* at 109. Concluding that it did, the Court reversed the decision, and in addressing the railroad's alternative ground for error—that the jury's responses to interrogatories regarding the railroad's ability to foresee the harm were fatally inconsistent with the general verdict—stressed that it is the duty of "courts to attempt to harmonize the answers, if it is possible under a fair reading of them. . . ." *Id.* at 119. The Court explained that courts must apply proper analysis when faced with an apparent inconsistency between the jury's ultimate findings of liability and damages and answers to special interrogatories:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798. *We therefore must attempt to reconcile the jury's findings*, ***by exegesis if necessary***, as in *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889; *McVey v. Phillips Petroleum Co.*, 288 F.2d 53 (C.A.5th Cir.); *Morris v. Pennsylvania R. Co.*, 187 F.2d 837 (C.A.2d Cir.) (collecting authorities), *before we are free to disregard the jury's special verdict* and remand the case for a new trial.

Id. (emphasis added). In an effort to reconcile the jury's answers with the verdict, the Court examined them in light of the instructions and verdict form questions as a whole and found them susceptible to an interpretation that avoided any inconsistency. *Id.* at 121.

The *Gallick* jury answered "No" to Question 20, which asked if the railroad had any reason to anticipate that the

stagnant pool would result in a "mishap" or an "injury" and also answered "No" to Question 22, which asked, in essence, if the causal relationship between the stagnant pond and the bite was reasonably foreseeable by the railroad. *Id.* at 119.

Looking to the precise wording of the instructions and the questions, the Court observed that the trial court's instructions "more than once . . . separated an 'insect bite' from 'injury,' 'infection,' 'illness' or 'disease.'" *Id.* at 120. Given this use of different terms, the Court concluded that the jury "might not have equated a foreseeable *insect bite* with a *mishap* or *injury*" and may have interpreted the answers simply to mean "that while an insect bite was foreseeable, there was no reason to anticipate a 'mishap' or 'injury' from such a bite." *Id.* (emphasis added). "Looking at No. 20 in the context of the charge and the total context of the special verdict, we cannot assign it sufficient weight to warrant overturning the judgment of the trial court entered pursuant to the jury's special verdict." *Id.* (citations omitted). The Court drew the same conclusion as to Question 22. *Id.*

The Court went on to identify a second reason why the answers did not warrant overturning the judgment. Given that a negligent actor need not foresee the particular damages that occurred to be held liable, the answers were found consistent with the result because they may have simply reflected "far too narrow a concept of foreseeable harm to negative negligence under. . ." FELA, allowing the appellate court to put them aside as "immaterial." *Id.* at 121. Concluding that there was no inconsistency that made the negative responses material to the outcome, the Court reversed the Ohio's appellate court's decision and remanded with directions. *Id.*

In stark contrast, the courts below *created* a perceived inconsistency by allowing the pre-existing condition questions to be asked in the first instance. Contrary to *Gallick*'s mandate, once faced with the perceived inconsistency, the

lower courts made no effort to seek a reconciling interpretation of the answers. To the contrary, they simply assumed that the jurors understood, despite the precise language of the instructions and the questions asked, that their responses bore directly on the question of damages. But, examining the precise words used per *Gallick's* example, it can only be concluded that the jury's answer to Question 6, contrary to the decision below, *did* "adjust the compensation amount . . . based on its determination of the relative effect of pre-existing conditions and the railroad's negligence." *Nichols*, 148 P.3d at 217, Appendix B at 16a. *See* Appendix H at 52a (Instruction 28). The differing terms employed in the instructions and the verdict questions could and should have led the courts below to a reconciling interpretation such as that reached by the *Gallick* Court. Interpreted according to its plain terms, it cannot be concluded that the jury considered Question 8 as asking for a response pertaining to "injuries" or "damages," given the question's reference only to "condition" and "pre-existing condition." Appendix A at 6a.

Neither the instructions nor the verdict form informed the jury that its answers to Questions 7 and 8 would result in a second reduction of its damage award. In contrast, the instructions *did* inform the jury that its answer to the comparative negligence question, Appendix H at 50a (Instruction 24), would reduce the general damage award provided in response to Question 6.

Further, courts must assume that the jury followed the instructions given. *See Gregory v. Morris*, 96 U.S. 619, 626 (1877); *Southern Pac. Co. v. Smith*, 83 F.2d 451, 452 (9th Cir. 1936); *American Ry. Express Co. v. Crabtree*, 271 F. 287, 288 (6th Cir. 1921); *Aetna Indem. Co. v. J.R. Crowe Coal & Mining Co.*, 154 F. 545, 558 (8th Cir. 1907); *Harper & Reynolds Co. v. Wilgus*, 56 F. 587, 589 (9th Cir. 1893). In evaluating the overall award, a court must consider the verdict form along with the instructions. *See Gallick*, 372

U.S. at 121; *Hickson Corp. v. Norfolk So. Ry. Co.*, 260 F.3d 559, 568 (6th Cir. 2001) ("The instructions and the verdict form should be considered together to determine whether they *presented the issues to the jury in a clear and fair manner.*").

The instructions in this case directed the jury to award damages caused *only* by the railroad's negligence and not to include in that award any amount for a pre-existing condition. Appendix H at 41a-42a, 50a, 52a, 54a-55a (Instructions 5, 24, 28, & 33). Assuming, as courts must, that the jury followed the instructions given, then it must follow that the answer to Question 6 did not include a finding pertaining to "damages" caused by a "pre-existing condition." Fairly interpreted, the answer to Question 8 can be explained either as consistent with the finding in Question 6 or immaterial as a finding necessarily subsumed in the ultimate fact determination made in answer to Question 6.

Additionally, while Question 6 instructed the jury to provide a general damage award "without any reduction for any negligence which you may find on the Plaintiff's part . . .," it did not instruct the jury to answer without any reduction for *pre-existing conditions*. This, taken in combination with the fact that Questions 7 and 8 asked the jury to allocate a percentage of Petitioner's condition to a pre-existing condition following Question 6's award of damages for the railroad's negligence, would lead a reasonable juror to understand that Questions 7 and 8 merely sought clarification of the jury's thought process in arriving at the $800,000 award.

In *Hager v. Norfolk & Western R. Co.*, 2006 WL 3634373 (Ohio 2006), the court dealt with a jury's interrogatory answer allocating 60% of the plaintiff's lung problems to a pre-existing condition. The court readily concluded that there was no inconsistency with the jury's damage assessment: "[R]eading the interrogatories in conjunction with the trial court's instructions, it appears the jury deducted the 60 percent from the verdict. It is presumed the jury followed the

trial court's instructions." *Id.* at *8. Indeed, the very purpose of the special verdict form is to check the jury's general award of damages. *See Hickson Corp.*, 260 F.3d at 568 (stating Illinois law, in a FELA action, regarding use of special interrogatories to check the jury's award of damages involving multiple theories of liability); *Worthy v. Norfolk & Western Ry. Co.*, 619 N.E.2d 1371, 1376 (Ill. App. 1993) (explaining that the function of the special interrogatory is to check the jury's understanding of the case by comparing the verdict to its conclusions as to the ultimate facts).

Finally, asking the jury to attribute a percentage of the damages caused only by the railroad awarded in answer to Question 6 to a cause other than the railroad, as Question 8 did here (Appendix A at 6a), asks the impossible. *See Norfolk Southern R. Co. v. Bradley*, 772 So.2d 1147, 1152 (Ala. 2000) (upholding trial court's refusal to employ interrogatories addressing pre-existing conditions because, "[t]he questions are inconsistent and present an incorrect basis for determining damages.").

II. FELA PERMITS A COURT'S REDUCTION OF A JURY'S DAMAGE AWARD BASED ONLY ON ONE APPORTIONMENT—FOR COMPARATIVE NEGLIGENCE OF THE EMPLOYEE.

In *Ayers*, 538 U.S. 135, this Court clarified the circumstances under which a court may apportion damages in a FELA action. Rejecting the railroad's contention that the trial court erred in instructing the jury not to make a deduction from the general damage award for the contribution of non-railroad asbestos exposures, the Court unanimously held that "FELA does not authorize apportionment of damages between railroad and non-railroad causes." *Id.* at 159-160. Based on the "statutory context" and the remedial nature of the Act, the Court observed that:

> [S]everal of the FELA's provisions expand a railroad's liability by abolishing common-law defenses that limited

> employees' ability to recover against their employers. Among the innovations, the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault. The statute *expressly prescribes no other apportionment.*
>
> Essentially, then, Norfolk asks us to narrow employer liability without a textual warrant. Reining in employer liability as Norfolk proposes, however, is both *unprovided for by the language of the FELA* and *inconsistent with the Act's overall recovery facilitating thrust.* Accordingly, we find Norfolk's plea an untenable reading of the congressional silence.

Id. at 161 (emphasis added; internal citations omitted). The Court noted that the railroad's view "runs counter to a century of FELA jurisprudence. No FELA decision made by this Court so much as hints that the statute mandates apportionment of damages among potentially liable tortfeasors." *Id.* Further, the Court recognized the "paucity of lower court authority for the proposition that the FELA contemplates apportionment" and that the railroad cited "only one FELA decision supporting its position,"—a "reed too slim" to warrant the requested relief. *Id.* at 162-163. The Court also contemplated the adverse consequences that would ensue if the railroad's position were adopted: "[R]eading the FELA to require apportionment would handicap plaintiffs and could vastly complicate adjudications. . . ." *Id.* at 165.

As the Court found in *Ayers*, 538 U.S. at 161, there is no "textual warrant" in FELA to justify a narrowing of employer liability as sanctioned by the Colorado Court of Appeals in this case. Nowhere does the language of FELA allow for a court to apportion a part of damages awarded by a jury to pre-existing conditions. That function is solely the province of the jury. Borrowing from *Ayers*, petitioner observes that no Supreme Court jurisprudence so much as "hints" that what the trial court did and the Court of Appeals sanctioned is permissible under FELA.

At the time of FELA's enactment, the only basis allowing a court to reduce damage awards was where they were *clearly excessive* in light of pre-existing conditions that would have caused some of the damages complained of even in the absence of the defendant's negligence.[7] *See, e.g., Pomroy v. Bangor & Aroostook R. Co.*, 67 A. 561, 563 (Me. 1907).

Moreover, as was the case with the apportionment sought in *Ayers*, acceptance here of the trial court's tendering of the pre-existing condition questions to the jury and its subsequent double reduction of the general verdict in reliance on the answers to those questions is "inconsistent with the Act's overall recovery facilitating thrust." *Ayers*, 538 U.S. at 161. The Act is liberally construed in favor of injured railway workers, *see Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985), and this purpose must be kept in mind when confronting any argument that would restrict an employer's liability. *See Baker v. Baltimore & Ohio R. Co.*, 502 F.2d 638, 641 (6th Cir. 1974). The result of the Court of Appeals' opinion in this case is to benefit respondent (and penalize petitioner) twice: once when the jury reduced damages in calculating the general award, and a second time when the trial court reduced the general verdict by the percentage answered in response to Question 8. This is totally inconsistent with FELA's remedial purposes.

Respondent, like the petitioner in *Ayers*, cited to sparse caselaw in support of its position in the Court of Appeals, relying principally on *Sauer v. Burlington N. R.R.*, 106 F.3d 1490 (10th Cir. 1996). *Sauer*, however, is neither controlling nor persuasive given its material distinctions. There, the pre-

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[7] Remittitur, however, bears no resemblance to the instant case, where the *court*, after trial, reduced the jury's general verdict not because the damage award was excessive, but based on the jury's answer to a superfluous question, upon which the court felt compelled to reduce the damages awarded despite the fact that the pre-existing condition was already accounted for by the jury per the court's charge.

existing condition question was not at issue on appeal. *Id.* at 1495. Further, the interrogatory referenced in *Sauer* differs from that involved in this proceeding in a most significant way: it asked, "What percentage of the *damages* [not "condition"] determined in Question No. 5 above are attributable to a *pre-existing condition* or to the Plaintiff's previous or subsequent accidents?" Appendix I at 58a (*Sauer*, Special Verdict Form One) (emphasis added). In contrast to the question asked below, the *Sauer* question clearly requested an apportionment of "damages" out of the general damage award. *Id.* The interrogatory in the instant action inquired only as to what percentage of Plaintiff's "*condition*" was attributable to a "*pre-existing condition.*" Appendix A at 6a (Special Verdict Form B, Question 8). When read in conjunction with the instructions forbidding the jury from awarding any damages not attributable to the defendant's negligence in this case, Appendix H at 52a (Instruction 28), it must be concluded that the jury's general damage award reflected consideration of pre-existing conditions in answer to Question 6.

Finally, as the *Ayers* Court found with regard to apportionment of fault to non-party causes, the decision affirming the trial court's use of this interrogatory and its subsequent reduction of the general verdict based on the jury's answer "would handicap plaintiffs and could vastly complicate adjudications. . ." under FELA. *Ayers*, 538 U.S. at 165.

III. THE DECISION BELOW CONFLICTS WITH OTHER STATE COURTS ON THE USE OF AND EFFECT TO BE GIVEN SPECIAL INTERROGATORIES ADDRESSING PRE-EXISTING CONDITIONS IN FELA ACTIONS.

The Court of Appeals' decision creates a split regarding the use and effect of special interrogatories addressing pre-existing conditions in the trial of FELA actions. The outcome

of this case, if allowed to stand, will engender inevitable inequities between FELA plaintiffs who litigate in different jurisdictions. If Mr. Nichols' case now were to be tried in Ohio, Alabama, or Illinois, as discussed below, his verdict would have been $560,000, rather than the twice-reduced award of $168,000 that he received for his permanently and totally disabling injuries. The result below defeats a core purpose of FELA—to create a uniform body of federal law to govern injury actions between railroad workers and their railroad employers, regardless of their location. *See Dice*, 342 U.S. at 361.

Alabama and Illinois state courts have held that the use of pre-existing condition interrogatories in FELA actions, nearly identical to those at issue in this dispute, is impermissible because they address no ultimate issue of fact and can only serve to create confusion with the jury. *See Norfolk Southern R. Co. v. Bradley*, 772 So.2d 1147, 1152 (Ala. 2000) (upholding trial court's refusal to submit special interrogatory addressing pre-existing conditions in FELA action because "[t]he questions are inconsistent and present an incorrect basis for determining damages. The questions would have asked the jury to determine the amount of damages [plaintiff] was entitled to based on the on-the-job accident and then to assign a percentage of those damages as being attributable to another accident or medical condition."); *Worthy v. Norfolk and Western Ry. Co.*, 619 N.E.2d 1371, 1376 (Ill. App. 1993) (upholding trial court's refusal to employ special interrogatories in FELA action addressing pre-existing conditions because, "While at first glance the special interrogatories appear to relate to the issue of aggravation, taken as a whole they relate to the issue of the reduction of damages," which is not a question of ultimate fact "upon which the rights of the parties directly depend. . . ."; thus, interrogatories were not in "proper form.").

The Ohio Supreme Court has held that, even if questions of the type at issue here are used, answers to them may not form the basis to reduce a FELA verdict. In *Hager v. Norfolk & Western R. Co.*, 2006 WL 3634373, *8 (Ohio 2006), the court declined to overturn the trial court's refusal to reduce the jury's general verdict in a FELA action by the jury's answer to a special interrogatory regarding pre-existing conditions. The court concluded that "reading the interrogatories in conjunction with the trial court's instructions, it appears the jury deducted the 60 percent from the verdict. It is presumed the jury followed the trial court's instructions." *Id.*

On the other hand, there is the decision below which approved the use of pre-existing condition interrogatories nearly identical to those involved in the above cases, and further held that the trial court, contrary to the terms of FELA and this Court's governing precedent, may reduce the jury's award of damages caused only by the negligence of the railroad based on the jury's responses to those questions. *Nichols* has already been cited by several treatises for this proposition. *See* Jacob A. Stein, *Stein on Personal Injury Damages*, § 11:15 (3rd ed. 2007); Sheila K. Hyatt and Stephen A. Hess, *Rule 59. Motions for Post-Trial Relief*, 5 Colorado Practice Series, Civil Rules Annotated, R 59 (4th ed., West's 2006).[8]

While it is too early to know through published opinions just how frequently railroads are citing to *Nichols* and *Sauer* in FELA pre-existing injury cases to support the use of such

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[8] The questions asking for allocation between a claimant's "condition" and a "pre-existing condition" are so fraught with mischief in terms of confusing the jury, interjecting needless complication, inviting perceived inconsistency and argument as to non-essential issues, that this Court should consider condemning any further use of questions of this type in FELA cases. As even the court below noted, the verdict form, when viewed against the instructions, is not a "model for future use. . . ." Appendix B at 14a.

interrogatories, there can be little doubt that the number is significant and will continue to grow until this Court spells out how pre-existing condition questions in FELA trials must be treated.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that his petition for writ of certiorari to the Colorado Court of Appeals be granted.

Respectfully submitted,

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APPENDIX A

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock Street
Denver, CO 80202

Case Number: 00 CV 4787

CHARLES A. NICHOLS,

Plaintiff,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Defendant.

ORDER OF JUDGMENT

THIS MATTER came on for trial on September 15, 2003. On September 18, 2003, a jury of seven duly sworn to try the issues herein returned a verdict in favor of Plaintiff and against Defendant. Specifically, the jury returned Verdict Form B (attached) and submitted its answers to special interrogatories 1—9. In so doing, the jury found both Plaintiff and Defendant negligent; that their negligence jointly contributed to Plaintiff's damages (see answers to questions number 1—5, Verdict Form B) and awarded damages of $800,000.00 (see answer to question number 6, Verdict Form B). The Court has considered the Defendant's Brief In Regard to the Net Jury Verdict, filed September 19, 2003 and the Plaintiff's Motion for Entry of Judgment, also filed September 19, 2003. Having reviewed all pertinent pleadings and legal authority, the Court makes the following findings, conclusions and orders.

It is undisputed that, given the jury's finding of contributory negligence, their award of damages is properly reduced to $560,000.00, reflecting that degree of negligence the jury found attributable to the Plaintiff (thirty [30%] percent). The question before the Court is whether, and to what extent, if any, the remaining award should be reduced in light of the jury's answer to questions number 7 and 8. Question number 7 reads as follows:

> **If your answers to Question Nos. 1 and 2 are "Yes," is all or part of Plaintiff's condition attributable to a pre-existing condition, if any?**
>
> **ANSWER: Yes.**

Question number 8 reads as follows:

> **If your answer to Question No. 7 is "Yes," what percentage of Plaintiff's condition is attributable to a pre-existing condition, if any?**
>
> **ANSWER: 70%**

Relying upon the holding in *Sauer v. Burlington Northern Railroad Company*, 106 F.3d 1490 (10th Cir. 1996), Defendant asks this Court to further reduce the jury's award by the percentage found to be attributable to pre-existing conditions, e.g. seventy (70%) percent. To the contrary, Plaintiff urges this Court to construe the jury's verdict so as to limit the reduction in the award solely to the percentage of the jury's finding of contributory negligence. This Court disagrees. To apply the construction proffered by Plaintiff necessarily ignores the jury's complete findings in this case, namely that Plaintiff was contributorily negligent **and** that his injuries complained of were primarily pre-existing the date of the accident. Applying the rationale set forth in *Sauer*, the Court finds that a further reduction of the jury's award is necessary and consistent with the jury's findings in this case.

Accordingly, the Court orders that the jury's award in this matter is properly reduced by the amount of contributory negligence attributable to the Plaintiff (30%) and, further by the percentage amount attributable to his pre-existing condition (70%), The Court further finds that the Defendant has filed an uncontested Amended Motion for Credits, in the amount of $3049.14, and said motion is hereby GRANTED. Plaintiff's Motion for Entry of Judgment is hereby DENIED.

Therefore, the Court hereby enters judgment, in favor of the Plaintiff, Charles A. Nichols, and against the Defendant, Burlington Northern Santa Fe Railway Company, in the amount of $164,950.86. Judgment enters pursuant to CRCP 58(a), effective today, and the effective date of entry of this judgment shall not be delayed for the taxing of costs. The clerk shall enter this judgment on the register of actions pursuant to C.R.C.P. 79(a).

Done and signed this 22nd day of September 2003.

BY THE COURT:

/s/ [Illegible]
Michael A. Martinez
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

City and County Building
1437 Bannock Street
Denver, CO 80202

Case Number: 00 CV 4787

CHARLES A. NICHOLS,
Plaintiff(s),

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
Defendant(s).

SPECIAL VERDICT FORM B

We, the jury, present out answers to the questions submitted by the Court, to which we have all agreed:

1: Was the Defendant negligent on November 7, 1999?

ANSWER: YES (Yes or No)

If your answer is "No" do not answer the remaining questions. Sign the verdict form

2: If your answer to Question No. 1 was "Yes", did the Defendant's negligence, if any, a cause of any of the injuries, damages or losses claimed by the Plaintiff on November 7, 1999?

ANSWER: YES (Yes or No)

If you [*sic*] answer is "No" do not answer the remaining questions. Sign the verdict form.

3: If your answers to Question Nos. 1 and 2 were "Yes" was the Plaintiff negligent on November 7, 1999?

ANSWER: YES (Yes or No)

If you [*sic*] answer is "No" proceed to Question No. 6.

4: If your answer to Question No. 3 was "Yes", did the Plaintiff's negligence cause any of his own claimed injuries on November 7, 1999?

ANSWER: YES (Yes or No)

If your answer is "Yes" proceed to Question No. 5. If you [*sic*] answer to Question No. 4 is "No" proceed to Question No. 6.

5: Taking as 100 percent of the combined negligence of the Defendant and the Plaintiff that caused the Plaintiff's damages, what percentage of the negligence was the Defendant's and what percentage was the Plaintiff's?

ANSWER: Percentage charged to Defendant,

The Burlington Northern and Santa Fe Railway Company 70%

Percentage charged to Plaintiff,

Charles A. Nichols 30%

Proceed to Question No. 6.

6: What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury?

ANSWER: $800,000

Proceed to Question No. 7.

7: If your answers to Question Nos. 1 and 2 are "Yes", is all or part of Plaintiff's condition attributable to a pre-existing condition?

ANSWER: YES (Yes or No)

If your answer is "No" proceed to Question No. 9.

8: If you [*sic*] answer to Question No. 7 is "Yes", what percentage of Plaintiff's condition is attributable to a pre-existing condition, if any?

ANSWER: 70%

Proceed to Question No. 9.

9: Did Plaintiff fail to mitigate his damages?

ANSWER: NO (Yes or No)

If your answer is "No" sign the verdict form.

10: If you [*sic*] answer to Question No. 9 is "Yes", what amount of Plaintiff's damages expressed in dollars as determined in response to Question No. 6 do you find could have been avoided by Plaintiff had he taken reasonable steps to mitigates his damages?

ANSWER: $___

[Illegible]
Foreman or Forewoman
[Illegible]
[Illegible]
[Illegible]

[Illegible]
[Illegible]
[Illegible]

APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No.: 03CA2145
City and County of Denver District Court No. 00CV4787
Honorable Michael A. Martinez, Judge

CHARLES A. NICHOLS,
Plaintiff-Appellant and Cross-Appellee,
v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,
Defendant-Appellee and Cross-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by: JUDGE CARPARELLI
Roy and Russel, JJ., concur

Announced: March 23, 2006

Roberts Levin & Patterson, P.C., Thomas L. Roberts, Laura E. Schwartz, Denver, Colorado; Law Offices of Martin E. Jackson, P.C., Martin E. Jackson, Conifer, Colorado, for Plaintiff-Appellant and Cross-Appellee

Hall & Evans, L.L.C., Malcolm S. Mead, Frederick T. Martinez, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

In this negligence action under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (2005) (FELA), plaintiff, Charles A. Nichols, a locomotive engineer, appeals the amount of the damages awarded to him upon a jury verdict

against defendant, Burlington Northern and Santa Fe Railway Company. On cross-appeal, the railroad appeals the judgment entered in favor of Nichols. We affirm.

The engineer's back and knee were injured when he lost his grip on a locomotive handrail and fell. The injuries aggravated pre-existing degenerative conditions and left him permanently disabled and unable to return to work.

The engineer sued pursuant to FELA, alleging the railroad's negligence caused (1) cumulative traumatic injury resulting in severe neck strain and injury and (2) injuries to his lower back and right knee that aggravated existing conditions.

The trial court granted the railroad's motion for summary judgment pursuant to C.R.C.P. 56, but a division of this court reversed and remanded the case for a trial on the merits. *Nichols v. Burlington N. & Santa Fe Ry.*, 56 P.3d 106 (Colo. App. 2002).

The parties settled the engineer's cumulative trauma claim before trial; they went to trial on the engineer's allegations that the railroad negligently failed to place reasonable work restrictions on him and failed to transfer him to a less strenuous position, and that both actions further aggravated his pre-existing conditions. The engineer claimed the railroad knew about the weakened strength in his right hand and negligently allowed him to continue working without restrictions, and that this negligence caused the fall. In response, the railroad asserted the engineer's contributory negligence and pre-existing conditions as affirmative defenses.

Following a four-day trial, the jury returned a verdict for the engineer. It valued the engineer's loss at $800,000, but determined his contributory negligence was 30%. Based on this finding, the court reduced the damages to $560,000. The jury also determined that 70% of his post-accident condition was attributable to a pre-existing condition. Based on this finding, the court further reduced the damages to $168,000.

The court also reduced the damages by $3049.14 based on the railroad's uncontested amended motion for credits.

Thus, the trial court entered a judgment in favor of the engineer in the amount of $164,950.56.

I. Certificate of Review and Expert Testimony

We first consider and reject the railroad's contention that the engineer's claim alleged negligence of medical professionals and that the judgment must be reversed because the engineer neither filed a certificate of review pursuant to § 13-20-602, C.R.S. 2005, nor presented expert testimony regarding the applicable standard of care.

A. Law

In every action for damages based on the alleged professional negligence of a licensed professional, the plaintiff's attorney must file a certificate of review within sixty days of serving the complaint. Section 13-20-602.

Under FELA, railroads have a duty to assign employees work for which they are reasonably suited. An employee may sue a railroad for damages caused by the railroad's negligent assignment of work beyond the employee's capacity. 45 U.S.C. § 51.

A railroad may also be liable for injuries to an employee if its doctors negligently perform physical examinations and negligently certify the employee to return to work without restrictions. Despite the railroad's reliance on the doctors, however, the employee is not required to demonstrate malpractice by the railroad's doctors. Instead, "it is sufficient to show that the railroad knew or should have known that the employee was unfit for the work because of his condition." *Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980); *see also Dunn v. Conemaugh & Black Lick R.R.*, 267 F.2d 571 (3d Cir. 1959) (concluding the railroad was liable for negligence pursuant to FELA when its doctor prematurely

certified the plaintiff's return to heavy labor). Thus, the primary focus of a claim under FELA is not the medical standard of care or the doctor's adherence to it, but rather, the railroad's knowledge that the employee could not return to work because of his medical condition.

Here, the railroad filed a pretrial motion to dismiss the case based on the engineer's failure to file a certificate of review. The trial court denied the motion, finding the remaining issues for trial were based on the railroad's negligence, not medical malpractice.

B. Conclusion

The engineer sued the railroad for negligence based on its failure to provide him with a reasonably safe work environment; he did not sue the railroad's doctors for medical malpractice. Several of the railroad's doctors examined the engineer and expressed conflicting opinions about whether to return him to work without restrictions. The final decision was made by the railroad's chief medical officer.

Because the engineer did not sue the doctors for medical malpractice, he was not required to file a certificate of review or to present evidence regarding a medical standard of care.

II. Damages

The engineer contends that, under FELA, a trial court may not reduce an award of damages other than as required by the statute for contributory negligence. We disagree.

The engineer has constructed his argument to traverse a narrow path. He concedes that the court correctly instructed the jury regarding the manner in which it could consider pre-existing conditions when determining damages and that it must be presumed that the jury followed that instruction when it arrived at the damages award entered on the special verdict form. However, he asserts that the import of the jury's answers to special verdict form questions addressing pre-exist-

ing conditions is unclear and that the trial court erred when, relying on those answers, it reduced the jury's damages. We are not persuaded.

A. Preservation of the Issue

A party is required to make specific, contemporaneous objections to special verdict forms before the trial court gives the forms to the jury. *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375 (Colo. App. 1996). Such objections allow the trial court to correct errors or clarify ambiguities before the forms are given to the jury, *See Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996); *Baum v. S.S. Kresge Co.*, 646 P.2d 400 (Colo. App. 1982). We may consider errors in verdict forms only to the extent that the grounds on appeal were specified by objection before the trial court instructed the jury. C.R.C.P. 51; *Bear Valley Church of Christ v. DeBose, supra.*

Here, before the jury was instructed, the engineer objected to Special Verdict Form B, asserting that the issue of pre-existing conditions is one that the parties may argue to the jury, and that the jury considers pre-existing conditions when it makes its award of damages. He emphasized that although FELA permits the court to reduce a jury's award based on contributory negligence, it does not permit the court to reduce an award based on pre-existing conditions.

Although the engineer's objection referenced *Sauer v. Burlington Northern RR.*, 106 F.3d 1490 (10th Cir. 1996), on appeal he asserts that *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261 (2003), applies.

We conclude that the engineer's objection was specific on the question of the propriety of the court's reduction of the damages award based on the jury's responses to the verdict form questions concerning pre-existing conditions. Accordingly, the engineer preserved the issue of the propriety of the

trial court's reduction of damages based on the jury's findings regarding pre-existing conditions.

However, to the extent the engineer now argues that the special verdict form was unclear because the questions regarding pre-existing conditions appeared in the wrong order on the form, the engineer stated no such objection at trial and, therefore, failed to preserve that issue.

B. Law

We first reject the engineer's argument that, under *Norfolk & Western Ry. v. Ayers, supra*, a trial court may only apportion damages in FELA cases based on comparative fault.

In *Ayers*, the United States Supreme Court concluded that the railroad must "bear the burden of identifying other responsible parties and demonstrating that some of the costs of the injury should be spread to them." *Norfolk & W. Ry. v. Ayers, supra*, 538 U.S. at 165, 123 S.Ct. at 1228. The Court did not state that railroads may be held liable for losses caused by an employee's pre-existing injuries and not aggravated by the railroad's negligence. *See Rust v. Burlington N. & Santa Fe Ry.*, 308 F. Supp. 2d 1230 (D. Colo. 2003). To the contrary, the award of damages against a railroad may exclude the proportion of losses that the employee's pre-existing condition would inevitably cause, regardless of the railroad's negligence. *Sauer v. Burlington N. R.R., supra; Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594 (1st Cir. 1996); *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985); *Maurer v. United States*, 668 F.2d 98 (2d Cir. 1981); *see* 3A Fed. Jury Prac. & Instr. § 155.65 (5th ed. 2001); CJI-Civ. 4th 6:8 (2004). Moreover, *Ayers* is not dispositive of whether a trial court may calculate the appropriate exclusion and reduce damages based on a jury's determination regarding the extent to which an employee's losses were caused by the negligence of the railroad and the extent to which they were caused by a pre-existing condition.

C. Instruction and Verdict Form

Here, consistent with the foregoing, the trial court instructed the jury that, if it found that (1) before the engineer fell from the locomotive, the engineer had a pre-existing condition in his right knee and lower back, and (2) the railroad's negligence regarding the fall from the locomotive made the engineer's condition worse, it was required to determine, if possible, the amount of damages, if any, caused only by the railroad's negligence. The court further instructed that, if the jury was not able to separate the damages in this way, the railroad was legally responsible for the entire amount of damages.

In pertinent part, Special Verdict Form B included the following questions and jury responses:

1. Was the [d]efendant negligent on November 7, 1999?

   ANSWER: yes

2. [D]id [sic] the [d]efendant's negligence, if any, a cause of any of the injuries, damages or losses claimed by the [p]laintiff on November 7, 1999?

   ANSWER: yes

3. [W]as the [p]laintiff negligent on November 7, 1999?

   ANSWER: yes

4. [D]id the [p]laintiff's negligence cause any of his own claimed injuries on November 7, 1999?

   ANSWER: yes

5. [W]hat percentage of the negligence was the [d]efendant's and what percentage was the [p]laintiff's?

ANSWER:

Percentage to Defendant, 70%

Percentage to Plaintiff, 30%

6. What amount do you find, without any reduction for any negligence which you may find on the [p]laintiff's part, will fairly and adequately compensate the [p]laintiff for the injury?

   ANSWER: $800,000

7. [I]s all or part of [p]laintiff's condition attributable to a pre-existing condition?

   ANSWER: yes

8. [W]hat percentage of [p]laintiff's condition is attributable to a pre-existing condition?

   ANSWER: 70%

After the jury returned its verdict and findings, the trial court reduced the compensation amount by thirty percent based on the engineer's contributory negligence, and by seventy percent based on the pre-existing condition.

The engineer contends that the amount the jury inserted in response to question six indicated either (1) that the jury had already determined the amount of damages caused only by the aggravation of his pre-existing condition and concluded that the amount which would fairly compensate him for injuries he sustained solely as a result of the accident was $800,000; or (2) that the jury was not able to separate the pre-existing condition from the aggravation of those conditions and that $800,000 represents the indivisible amount of the total damages for which the railroad was liable.

D. Conclusions

Although the combination of the instruction and the special verdict form are not models for future use, the instructions, when taken as a whole, properly informed the jury regarding

the applicable law. Thus, the trial court did not err when it reduced the damages in accordance with the jury's responses to questions seven and eight.

The amount of damages to which a plaintiff is entitled is a matter within the sole province of the jury. *Roberts v. C & M Ready Mix Concrete Co.*, 767 P.2d 769 (Colo. App. 1988). When possible, trial courts must give effect to a jury's verdict.

On appeal, we must attempt to reconcile a jury's answers to special verdict questions if we can do so based on the evidence and the instructions given. *Kepley v. Kim*, 843 P.2d 133 (Colo. App. 1992); *Lonardo v. Litvak Meat Co.*, 676 P.2d 1229 (Colo. App. 1983).

The first three questions on the special verdict form addressed the railroad's liability to the engineer. The fourth and fifth questions addressed the engineer's contributory negligence. The sixth question asked the jury to determine the amount that would compensate the engineer for the injury he incurred when he fell from the locomotive. That question explicitly advised the jury not to consider any reduction based on the engineer's contributory negligence. It was silent as to damages for aggravation of pre-existing conditions.

The engineer's evidence showed that his losses were between $600,000 and $800,000, and he argued that the jury should award him between $750,000 and $950,000. Both parties' closing arguments focused on the issue of negligence. Neither argument addressed the effect of pre-existing conditions on the engineer's damages. None of the first six questions on the verdict form addressed pre-existing conditions. We conclude that the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the railroad's negligence or for pre-existing conditions.

We reject the engineer's argument that the jury may have arrived at the $800,000 figure after determining the extent to which his losses were caused only by the aggravation of his pre-existing condition.

The special verdict form directed the jury to address fair compensation before it directed the jury to address the engineer's pre-existing condition. Moreover, to arrive at the $800,000 figure after reducing the engineer's losses by the seventy percent attributable to pre-existing conditions, as reflected in the response to question eight, the jury first would have had to conclude that the engineer's total, unreduced damages were more than $2.5 million. There was no evidence upon which the jury could have concluded that the engineer's damages exceeded $1 million.

Therefore, we conclude that the jury did not adjust the compensation amount reflected in the response to question six based on its determination of the relative effect of pre-existing conditions and the railroad's negligence. Consequently, we also conclude that the trial court did not err when it reduced the compensation the jury stated in response to question six based on the jury's response to questions seven and eight of Special Verdict Form B.

III. Attorney Fees

Pursuant to C.A.R. 38(d), the engineer requests reasonable attorney fees and expenses incurred in defending against the railroad's argument on cross-appeal. Although we reject the railroad's arguments on cross-appeal, we cannot conclude those arguments are frivolous within the meaning of C.A.R. 38(d). Thus, the engineer's request for attorney fees and expenses is denied.

Judgment affirmed.

JUDGE ROY and JUDGE RUSSEL concur.

APPENDIX C

COLORADO COURT OF APPEALS

[Filed May 25, 2006]

No. 03CA2145

CHARLES A. NICHOLS,
Plaintiff-Appellant / Cross-Appellee,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Defendant-Appellee / Cross-Appellant.

APPEAL FROM THE DENVER DISTRICT CIVIL COURT
HONORABLE MICHAEL A MARTINEZ, JUDGE
NO. 00CV4787

ORDER DENYING PETITION FOR REHEARING

The PETITION FOR REHEARING filed in this appeal by:

CHARLES NICHOLS/PLAINTIFF-APPELLANT

CHARLES NICHOLS/PLAINTIFF-APPELLANT

is DENIED. OPINION MODIFIED AND AS MODIFIED PR DENIED

Issuance of the Mandate is stayed until: June 26, 2006

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay shall remain in effect until disposition of the cause by that Court.

By the Court:

CARPARELLI, J.
ROY, J.
RUSSEL, J.

COLORADO COURT OF APPEALS

Court Of Appeals No.: 03CA2145
City and County of Denver District Court No. 00CV4787
Honorable Michael A. Martinez, *Judge*

CHARLES A. NICHOLS,
Plaintiff-Appellant and Cross-Appellee,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Defendant-Appellee and Cross-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by: JUDGE CARPARELLI
Roy and Russel, *JJ.*, concur

Opinion Modified, and As Modified
Petition for Rehearing *DENIED*

Announced: March 23, 2006

Roberts Levin & Patterson, P.C., Thomas L. Roberts, Laura E. Schwartz, Denver, Colorado; Law Offices of Martin E. Jackson, P.C., Martin E. Jackson, Conifer, Colorado, for Plaintiff-Appellant and Cross-Appellee

Hall & Evans, L.L.C., Malcolm S. Mead, Frederick T. Martinez, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

* * * *

OPINION is modified as follows:

Page 13, line 14 currently reads:

> injuries did not include any offset for the railroad's negligence or for

Page 13, line 14 is modified to read:

> injuries did not include any offset for the engineer's negligence or for

* * * *

would compensate the engineer for the injury he incurred when he fell from the locomotive. That question explicitly advised the jury not to consider any reduction based on the engineer's contributory negligence. It was silent as to damages for aggravation of pre-existing conditions.

The engineer's evidence showed that his losses were between $600,000 and $800,000, and he argued that the jury should award him between $750,000 and $950,000. Both parties' closing arguments focused on the issue of negligence. Neither argument addressed the effect of pre-existing conditions on the engineer's damages. None of the first six questions on the verdict form addressed pre-existing conditions. We conclude that the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the engineer's negligence or for pre-existing conditions.

We reject the engineer's argument that the jury may have arrived at the $800,000 figure after determining the extent to which his losses were caused only by the aggravation of his pre-existing condition.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203

CASE NO. 06SC413

CHARLES A. NICHOLS,
Petitioner/Cross-Respondent,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
Respondent/Cross-Petitioner.

CERTIORARI TO THE COURT OF APPEALS,
03CA2145 DISTRICT COURT,
CITY & COUNTY OF DENVER, 00CV4878

ORDER OF COURT

Upon consideration of the Petition and Cross-Petition for Writs of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of said court of appeals,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writ of Certiorari shall be, and the same hereby are, DENIED.

BY THE COURT, EN BANC, DECEMBER 18, 2006.

[Logo]

Copies mailed via the State's Mail Services Division on 12/18/06

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Clerk of the Court
Colorado Court of Appeals

APPENDIX E

45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 52

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 53

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any

statute enacted for the safety of employees contributed to the injury or death of such employee.

---

45 U.S.C. § 54

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

APPENDIX F

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, CO 80202

[Filed FEB. 13, 2004]

Case Number: 00 CV 4787
Courtroom 7
Volume II

CHARLES A. NICHOLS,
Plaintiff,

v.

BURLINGTON NORTHERN & SANTA FE RAILWAY,
Defendant.

TRANSCRIPT OF RECORDED PROCEEDINGS

The above-entitled matter was heard on Wednesday, September 17, 2003 before the Honorable Michael A. Martinez, Judge of the District Court.

Appearances.

Charles A. Nichols, Plaintiff
Martin E. Jackson, Plaintiff's Attorney

Burlington Northern & Santa Fe Railway
Frederick T Martinez, Defendant's Attorney

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	Direct	Cross	Redirect	Recross
Witnesses:				
Sue Nichols	15	21	34	37
Peter Weingarten, M.D.	40	50	59	60
Michael Jarrard, M.D.	63	71	90	92
Charles Nichols	100	109	112	
Dr. James Mandel	118	142	159	164
Thomas Starkey, M.D.	178	189	200	204
Rita Blecha	207	217	221	222

Exhibits	Admitted
Exhibit SS	27

* * * *

[40] assign Mr. Nichols to a job that he was—was not suited for because of his weakened physical condition, and did the railroad know that. So I think that Mr. Jackson gets to argue that with the previous instruction I've agreed to give, and I won't give the second one.

MR. JACKSON: Number 10 has been given apart and modified by the Court (inaudible) the mitigation instruction.

THE COURT: And so those are the two that were withdrawn according to the sticky's I have.

MR. JACKSON: The last two.

THE COURT: The last two.

MR. JACKSON: Yes, Your Honor.

THE COURT: Okay. So that completes the plaintiff's instructions. Now, don't go anywhere yet. I want to make sure—

MR. MARTINEZ: We haven't addressed the verdict forms, Judge.

MR. JACKSON: I think he did.

THE COURT: Yeah, I did. I'm going to use A and B, and I'm not going to use the interrogatories.

MR. MARTINEZ: Judge, I gave the Court my copy, because Mr. Jackson didn't have his (inaudible). So (inaudible).

THE COURT: Sure. Hang on a second.

[41] MR. JACKSON: And thank you for that.

THE COURT: Here's yours. And you'll see that the objections you pointed out to me earlier in terms of where his address was, and stuff, I whited that out. But otherwise the language tracks yours. It's just in two different forms. So frankly I think that makes it a little easier for the jury, and for you. I mean (inaudible) if you believe the defense case, and you fill out their Form A, go to question—to question three, and don't go anywhere else.

MR. MARTINEZ: The problem, Judge, is this. My verdict form is different. It has additional elements. Our verdict form actually asks the jury to address the issues of pre-existing. It also asks the jury to address the issue of mitigation of damages, and then to assign a percentage or number to that so that the Court can then reduce it. And those are the instructions that we have already tendered to the Court to rule on. His instructions only address contributory negligence, special verdict form B. That's the only reduction.

THE COURT: Okay.

(Pause.)

MR. MARTINEZ: In light of the Court's ruling, I will not—

THE COURT: You know what? I didn't have the last [42] para—I didn't have the last page, for some reason, as to the mitigation issues. Mr. Jackson, in light of the fact that I have already said I'm going to give them a mitigation instruction, and we've given two other instructions defining mitigation in some fashion, I think it's appropriate to give them the language to fill it out so we know what their determination is on those issues. And then as a matter of law, the Court reduces any verdict, if appropriate, based on their response to those questions.

So what I would propose, and ask you to look at, Mr. Martinez, is the verdict form. And what I would propose is using your verdict form A as it is, and using Mr. Martinez's Special Verdict Form, modified to reflect that it's Verdict Form B.

MR. JACKSON: I—may I be heard, Your Honor?

THE COURT: Yeah.

MR. JACKSON: No objection to using my verdict form. Very strenuous objection to using Mr. Martinez's verdict form. The only reduction that the Court is allowed to make under the FELA is pursuant to 45 U.S.C. § 53, which is the contributory negligence statute, and that's why my verdict forms are submitted the way they are. There are reductions of mitigation, and a reduction for—what was the other thing on this form, Your Honor?

MR. MARTINEZ: Pre-existing condition.

[43] MR. JACKSON: Pre-existing condition. That is argument that must be made to the jury, and the jury makes its award. The only reduction provided by the federal law is for contributory negligence. That is appropriate for the Court to do after the jury renders its verdict. It is not appropriate for that to be submitted to the jury, nor for them to make a finding.

MR. MARTINEZ: Actually, Judge, under the Sower v. Bogatilla case, I argued that. I was in that jury trial. That verdict form tracks this. It was a special interrogatory where the jury could find a pre-existing condition, assign a percentage, where the Court, as a matter of law, reduced the amount of damages. And in that case they said because he had a degenerative disc condition in his lumbar spine, and without having to express any mathematical certainty, that was sufficient to go before the jury, and entitled a special verdict form which was approved by the 10th Circuit Court of Appeals.

THE COURT: All right. I'm going to give Special Verdict Form B, as modified, as the second jury verdict form. It seems to me the other issues we can reserve for argument once the verdict comes back. It may or may not be applicable.

MR. JACKSON: May I just—for clarification, Your [44] Honor?

THE COURT: Yes.

MR. JACKSON: Is—is the proffer of defendant's verdict form a form that was approved by the 10th Circuit in the Sower case?

MR. MARTINEZ: The special—the use of special interrogatories as it relates to sole negligence, contributory negligence, the pre-existing condition, it did not have the issue of mitigation of damages in that case. Mitigation of damages was not an issue before the Sower court.

One thing to be—in all fairness to plaintiff's counsel, Judge, you had asked in Special Verdict Form A and B, the—if any language—

THE COURT: Right.

MR. MARTINEZ: —or no matter how small language. My verdict form does not incorporate that. And to the extent we need to modify so that it's consistent, I want to be fair with that.

MR. JACKSON: Okay. Thank you. Thank you, counsel.

THE COURT: Okay.

MR. JACKSON: And I will object to any verdict form that's submitted inconsistent with the Sower opinion.

THE COURT: Okay.

APPENDIX G

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
City and County Building
1437 Bannock Street
Denver, CO 80202

[Filed SEP. 19, 2003]

Case Number: 00 CV 4787
Ctrm.: 7

CHARLES A. NICHOLS,

Plaintiff,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Defendant.

Attorney for Plaintiff:

Name:	Martin E. Jackson
Address:	PO Box 862
	Conifer, CO 80433-0862
Phone No.:	303/816-5714
Fax No.:	303/816-5717
Atty Reg#:	31771

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

INTRODUCTION

The Court has requested that counsel brief issues in connection with the jury verdict form rendered to the court on September 18, 2003 in this case. Plaintiff submits this, his brief, in connection with his Motion for Entry of Judgment.

This case was tried to a jury verdict over the course of four days beginning September 15, 2003. The parties submitted various jury instructions and jury verdict forms to the court. At the charge conference, the court adopted the Defendant's proffered Jury Verdict form B, which is the form used by the jury to render its verdict. Defense counsel represented to the court that the proffered verdict form was appropriate pursuant to the case of *Sauer v. Burlington Northern Santa Fe Railroad Company*, 106 F.3d 1490 (1997) on the issue of Plaintiff's pre-existing physical conditions. The Defendant's proffered verdict form contained two questions, 6 and 7 which ask the jury to determine the "percentage of the Plaintiff's condition . . . attributable to a pre-existing condition."

Counsel for the Plaintiff objected to the use of this verdict form and instead urged the court to utilize his proffered verdict form B (Exhibit 1) which allows the jury to determine the issues of negligence and contributory negligence. Plaintiff's counsel's objections to the jury verdict form B were overruled.

After the return of the jury's verdict in the amount of $800,000,00 on September 18, 2003, the court instructed the parties that it would withhold entry of judgment on behalf of the Plaintiff until the parties had briefed the issue of the appropriate reductions to the gross verdict. The Plaintiff respectfully requests immediate entry of judgment on his behalf and against the Defendant in the amount of $560,000.00. He acknowledges that a reduction of $240,000.00 is necessary and appropriate in light of the jury's answer to Question 5, assigning 30 per cent contributory negligence to the Plaintiff. 45 U.S.C. § 53.

Apparently the only issue in dispute is how to address the jury's answers to Questions 7 and 8 in which the jury was asked to determine what percentage of the Plaintiff's condition is attributable to a pre-existing condition.

ARGUMENT

In support of this motion, the Plaintiff would show the court as follows:

1) The jury form properly distinguishes between damages attributable to "injury" and those attributable to a pre-existing condition.

Question 6 on Jury Verdict Form B, completed by the jury, asks:

> What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the ***injury?***
>
> ANSWER: $800,000.00.

The questions 7 and 8 address the pre-existing condition issues. The form does not request the jury to make a reduction of damages for any pre-existing condition, it simply requests, in Question 8 for the jury to determine

> [W]hat percentage of the Plaintiff's condition is attributable to a pre-existing condition, if any?
>
> Answer: 70%

This is an ambiguity in the form, to be sure, but this form was proffered by the Defendant, over Plaintiff's objections. In fairness to the Plaintiff, such ambiguities should be resolved in favor of the Plaintiff, especially in an F.E.L.A. case where the law explicitly favors a recovery by an injured worker once railroad negligence has been proven.

More importantly, this verdict form is not the same as the one used in *Sauer*, so reliance upon that opinion by the Defendant is misplaced. This was the basis of one of Plaintiff's counsel's objections to the submission of this particular

verdict form. In *Sauer*, although not reproduced in the opinion, the court does describe the forms:

> The special verdict forms submitted to the jury asked for the percentage of damages from each of the two accidents attributable to preexisting conditions or prior accidents. The jury found BN was negligent only in the second accident and found 75 percent of Sauer's damages were attributable to preexisting conditions or prior accidents.

106 F.3d at 1494.

The form submitted to the jury in Mr. Nichols' case does not ask the jury to determine the percentage of damages attributable to pre-existing conditions. Question 7 asks for the jury to decide what percentage of Plaintiff's ***condition***, is attributable to a ***pre-existing condition***. It does not, as in *Sauer*, ask for a determination of what "percentage of *damages* from each of the two accidents [was] attributable to pre-existing conditions or prior accidents." Ibid [*sic*]. The distinction between physical condition and damages is not metaphysical and should have been explained clearly to the jury if it was the Defendant's intention to have the verdict reduced based on the amount of damages which the jury believed was attributable to pre-existing conditions.

Because the jury decided that 70 percent of the Plaintiff's "***condition***" was attributable to pre-existing factors, it must be assumed from a plain reading of the jury verdict form that they attributed 30 percent of his "condition" to the physical conditions caused by the accident. The jury found the Defendant negligent in causing the accident. They found in Question 6 that the amount of $800,000.00, without reduction for his own negligence, would fairly and adequately compensate him for "***the injury***." The logical reading of the intent of the jury, given the nature of this form, is that the jury assigned a value of $800,000.00 to the 30 percent of the "con-

dition" which was not attributable to pre-existing conditions, that is, the ***injuries*** caused by the accident complained of in this lawsuit.

Questions 7 and 8 do not address damages in any way.

2) The holding in *Sauer*, does not approve a particular verdict form. It does instruct, as indicated above, that the jury may determine the percentage of damages attributable to pre-existing conditions. *Sauer* is essentially concerned with whether there was sufficient evidence to submit an apportionment instruction. The significance of the case is chiefly that expert witnesses are not necessary to provide a basis for the jury to apportion damages. The verdict form in Mr. Nichols' case did not request that the jury apportion damages based upon a pre-existing condition. Counsel has been unable to find any F.E.L.A. case other than *Sauer* where such an [*sic*] verdict form was used and has found no case whatsoever in which a verdict form similar to the one proffered by the Defendant and used in this case was addressed by any court.

3) Jury Instruction 28, given by the court to the jury in this case provides, in relevant part, that:

> If you find that all of these three statements have been proved by a preponderance of the evidence, it is your duty to determine, if possible, the amount of damages, if any, caused only by the negligence of the defendant.

This is the only instruction regarding pre-existing conditions given to the jury. The jury is clearly told to determine the amount of ***damages*** caused only by the Defendant's negligence. They are not told to determine damages and then make a reduction for pre-existing conditions. They are to consider the pre-existing conditions in determining the amount of the damages and make their answer to question number 6 accordingly. It must be assumed that if the jury followed these instructions, that they accounted for preexisting injuries in arriving at their damage award.

If the jury followed this instruction, as must be assumed, the answers to questions 7 and 8 can only be viewed as informative regarding their perceptions of the contribution of the accident to the Plaintiff's physical condition, but can in no way be construed to relate to their determination of damages as they were instructed in number 28. Questions 7 and 8 do not require the jury to determine an amount of damages attributable to the injury or to a pre-existing condition.

4) It is anticipated that the BNSF will argue that the inclusion of questions 7 and 8 is meaningless if some reduction is not made to the verdict based on the answers to these questions. If that was the intent of the jury verdict form proffered by the Defendant, it should have been crafted to achieve that result. It was not the Plaintiff who proffered this form. The jury verdict form does not comply with the holdings in *Sauer* and extreme prejudice would result to the Plaintiff if a reduction is made as proposed by the Defendant. This would essentially result in a double credit for the pre-existing conditions found to be present by the jury.

5) If judgement is not entered on behalf of the Plaintiff as requested in this motion, there is no rational method of determining exactly what the net award to the Plaintiff should be because the jury was not asked to determine what portion of his damages was attributable to his condition, only what portion of his condition was attributable to a preexisting condition. They were clearly instructed that they were to award only damages attributable to the negligence of the defendant. This they have done.

WHEREFORE, Plaintiff respectfully requests immediate entry of judgment on his behalf in the amount of $560,000.00, exclusive of costs and other items to which he may be justly entitled.

BY: /s/ Martin E. Jackson
MARTIN E. JACKSON
Attorney for Plaintiff Charles A. Nichols

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
City and County Building
1437 Bannock Street
Denver, CO 80202

Case Number: 00 CV 4787
Ctrm.: 7

CHARLES A. NICHOLS,

Plaintiff,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Defendant.

Attorney for Plaintiff:

Name:	Martin E. Jackson
Address:	PO Box 862
	Conifer, CO 80433-0862
Phone No.:	303/816-5714
Fax No :	303/816-5717
Atty Reg#:	31771

SPECIAL VERDICT FORM B

DO NOT ANSWER THIS SPECIAL VERDICT FORM IF YOUR FOREPERSON HAS COMPLETED, AND ALL JURORS HAVE SIGNED, SPECIAL VERDICT FORM A.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the Plaintiff have injuries, damages, and losses? (Yes or No)

   ANSWER: _____

2. Was the Defendant negligent? (Yes or No)

   ANSWER: _____

3. Was the Defendant's negligence, if any, a cause of any of the injuries, damages, or losses claimed by the Plaintiff? (Yes or No)

   ANSWER: _____

4. Was the Plaintiff negligent? (Yes or No)

   ANSWER: _____

5. Was the Plaintiff's negligence, if any, a cause of his own claimed injuries, damages, and losses? (Yes or No)

   ANSWER: _____

6. What amount do you find and without any reduction will fairly and adequately compensate Plaintiff for the injuries, damages, and losses caused by Defendant's negligence? You should answer "0" if you determine there were none.

   ANSWER: $_____

Answer the following question #7 only if your answer to all five #1, #2, #3, #4 and #5 is "yes."

7. Taking as 100% the combined negligence of the Defendant and the Plaintiff that caused the Plaintiff's injuries, damages, and losses, what percentage of the negligence was the Defendant's and what percentage was the Plaintiff's.

   ANSWER:

   Percentage charged to Defendant: _____%

   Percentage charged to Plaintiff _____%

Must total 100%

_____	_____
Foreperson	
_____	_____
_____	_____
_____	

APPENDIX H

INSTRUCTION NO. 1

These instructions contain the law that you must use in deciding this case. No single instruction states all the applicable law. All the instructions must be read and considered together.

You must not be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law should be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

The Court does not, by these instructions, express any opinions as to what has or has not been proved in the case, or to what are or are not the facts of the case.

INSTRUCTION NO. 2

I will now explain the claims and defenses of each party to the case and the law governing the case. Please pay close attention to these instructions. These instructions include both general instructions and instructions specific to the claims and defenses in this case. You must consider all the general and specific instructions together. You must all agree on your verdict, applying the law, as you are now instructed, to the facts as you find them to be.

The parties to this case are: Charles A. Nichols, the Plaintiff and Burlington Northern Railway Company, the Defendant.

The Plaintiff claims: On November 7, 1999 Plaintiff sustained injuries and losses as a result of Defendant's negligence.

The Defendant denies it was negligent. As affirmative defenses, the Defendant claims that Plaintiff was solely or contributorily negligent. Any injuries or losses are a result of

Plaintiff's sole negligence. Further, Defendant alleges that Plaintiff failed to mitigate his damages

These are the issues you are to decide.

INSTRUCTION NO. 3

In addition to denying that any negligence of the Defendant caused any injury or damage to the Plaintiff, the Defendant alleges, as a further defense, that some contributory negligence on the part of the Plaintiff himself was a cause of any injuries and consequent damages Plaintiff may have sustained. Contributory negligence is fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the Defendant in effect alleges that, even though the Defendant may have been guilty of some negligent act or omission which was one of the causes, the Plaintiff himself, by his own failure to use ordinary care under the circumstances for his own safety, at the time and place in question, also contributed one of the causes of any injuries and damages Plaintiff may have suffered.

The burden is on a Defendant, alleging the defense of contributory negligence, to establish, by a preponderance of the evidence in the case, the claim that the Plaintiff himself was also at fault, and that such fault contributed one of the causes of any injuries and consequent damages Plaintiff may have sustained.

INSTRUCTION NO. 4

If you find that the Plaintiff was negligent, and that Plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of the Defendant.

INSTRUCTION NO. 5

In order for Plaintiff to recover in this case, he must prove by a preponderance of the evidence that any injury he sus-

tained was the result of the negligence of the Defendant. You must not speculate in this respect. It is not sufficient for Plaintiff to show that such condition could have been caused by the alleged accident. Defendant is not to be held responsible for any ailments which Plaintiff may suffer which resulted from any cause other than the accident mentioned in the evidence. Any physical disability which you find to be attributable to any prior or subsequent accident or illness and which is not a direct result of the accident complained of is not a part of this action and should not be considered by you.

INSTRUCTION NO. 6

You are instructed that if an employee has a choice of ways to doing a particular job in the course of his employment, one way involving danger and risk of injury to himself and another way that is safe or less dangerous, and he voluntarily chooses the unsafe or more dangerous way, then the employee may be deemed negligent, if the risk of injury was obvious and such as a man of ordinary prudence would have avoided.

INSTRUCTION NO. 7

The occurrence of an accident does not raise any presumption of negligence on the part of either the Plaintiff or the Defendant.

The mere fact that an accident happened, standing alone, does not, unless otherwise expressly stated, permit the jury to draw the inference that the accident was caused by anyone's negligence.

INSTRUCTION NO. 8

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damages suffered by the Plaintiff, you may find that such

injury or damage was legally caused by the Defendant's act or omission.

Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the claim under the FELA for negligence, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support the claim, you will then consider the defense raised by the Defendant.

INSTRUCTION NO. 9

The negligence, if any, of the Defendant, Burlington Northern Santa Fe Railway Company, is not a cause of any injuries, damages and losses to the Plaintiff, Charles A. Nichols, unless injury to a person in the Plaintiff's situation was a reasonably foreseeable consequence of that negligence. The exact or precise injury need not have been foreseeable, but it is sufficient if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the Plaintiff's situation might result from the Defendant's conduct.

INSTRUCTION NO. 10

It was the continuing duty of the Defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the Plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see

that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in the case.

INSTRUCTION NO. 11

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property.

"Ordinary care" is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required, in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence in the case. To put it another way, as the danger that should reasonably be foreseen increases, so the amount of care required by the law also increases.

INSTRUCTION NO. 12

In order to prove the essential element of Plaintiff's claim, the burden is on the Plaintiff to establish, by a preponderance of the evidence in the case, the following facts:

First, that the Defendant was negligent in one or more of the particulars alleged; and

Second, that the Defendant's negligence caused or contributed to some injury and consequent damage sustained by the Plaintiff.

On the other hand, if you should find: (1) that the Defendant was not negligent; or (2) that the Defendant was negligent, but such negligence was not a cause of injury or damage sustained by the Plaintiff, then your verdict should be for the Defendant.

INSTRUCTION NO. 13

In this case the Plaintiff's claims are asserted under the Federal Employers' Liability Act. The Federal Employers' Liability Act provides, in part, that:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . or by reason of any defect or insufficiency, due to its negligence in its . . . appliances . . . track . . . or other equipment."

In order to prevail on this claim, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

(1) That the Defendant was "negligent" as claimed by the Plaintiff; and,

(2) That such negligence was a "legal cause" of damage sustained by the Plaintiff.

INSTRUCTION NO. 14

Certain testimony has been read into evidence from a transcript of an earlier proceeding. The transcript is testimony taken under oath at the earlier proceeding and preserved in writing. You are to consider that testimony as if it had been given before you from the witness stand.

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given by the witness from the witness stand.

INSTRUCTION NO. 15

The weight of evidence is not necessarily determined by the number of witnesses testifying to a particular fact.

You must not be influenced by sympathy, bias, or prejudice for or against any party in this case.

The lawyers have highlighted certain parts of some exhibits. However, it is for you to determine the significance of the highlighted parts.

INSTRUCTION NO. 16

You have heard the parties stipulate or agree to the existence of a fact or that a fact has been admitted. This agreement makes the presentation of any evidence to prove this fact unnecessary. The agreement means that you must accept these facts as true.

INSTRUCTION NO. 17

Any finding of fact you make must be based on probabilities, not possibilities. You should not guess or speculate about a fact.

The evidence in the case consists of the sworn testimony of all the witnesses and all exhibits which have been received in evidence.

In deciding the facts, you must consider only the evidence received at trial. Evidence offered at the trial and rejected or stricken by the Court must not be considered by you. Statements, remarks, arguments, and objections by counsel and remarks of the Court not directed to you are not evidence.

You are to consider only the evidence in the case and the reasonable inferences from that evidence. An inference is a deduction or conclusion, which reason and common sense lead the jury to draw from other facts that have been proved.

Evidence may be either direct or circumstantial. Circumstantial evidence is the proof of facts or circumstances from which the existence or nonexistence of other facts may reasonably be inferred. All other evidence is direct evidence. The law makes no distinction between the effect of direct evidence and circumstantial evidence.

INSTRUCTION NO. 18

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony; their motives; whether their testimony has been contradicted or supported by other evidence; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

A witness qualified as an expert by education, training, or experience may state opinions. You should judge expert testimony just as you would judge any other testimony. You may

accept it or reject it, in whole or in part. You should give the testimony the importance you think it deserves, considering the witness's qualifications, the reasons for the opinions, and all of the other evidence in the case.

Based on these considerations, you may believe all, part or none of the testimony of a witness.

INSTRUCTION NO. 19

1. The Plaintiff has the burden of proving his claims by a preponderance of the evidence.

2. The Defendant has the burden of proving each of his affirmative defenses by a preponderance of the evidence.

3. To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not.

4. "Burden of proof" means the obligation a party has to prove his claims or defenses by a preponderance of the evidence. The party with the burden of proof can use evidence produced by any party to persuade you.

5. If a party fails to meet its burden of proof as to any claim or defense or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must reject that claim or defense.

INSTRUCTION NO. 20

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in the court of justice.

INSTRUCTION NO. 21

Since a corporation can act only through its officers, or employees, or other agents, the burden is on the Plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of the Defendant other than the Plaintiff himself was a cause of any injuries and consequent damages sustained by the Plaintiff.

Any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of his duties, is held in law to be the negligence of the corporation.

INSTRUCTION NO. 22

Defendant alleges that, at the time and place in question, Plaintiff was guilty of contributory negligence in the following particulars:

1. Failed to use equipment which was readily available for use.

2. Failed to wait for assistance which was readily available.

3. Failed to use established methods of loading equipment onto a locomotive.

4. Failed to acknowledge his own physical abilities when loading equipment onto the locomotive.

5. Failed to take time to work safely.

INSTRUCTION NO. 23

Section 3 of the Federal Employers' Liability Act, 45 U.S.C.A. §53, provides in part that:

> In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee

may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

So, if you should find, from a preponderance of the evidence in the case, that the Defendant was guilty of negligence which caused, in whole or in part, any injury or damage to the Plaintiff; and should further find, from a preponderance of the evidence in the case, that the Plaintiff himself was guilty of contributory negligence which contributed toward bringing about all or part of his own injury; then the total award of damages to the Plaintiff will be reduced by the court by an amount equal to the percentage of fault or contributory negligence chargeable to the Plaintiff.

INSTRUCTION NO. 24

The proper procedure to be followed by the jury in comparing the negligence of the parties and returning a verdict in favor of the Plaintiff for a reduced amount based upon that comparison, is: first, determine the full amount of all damages sustained by the Plaintiff, as a proximate result of the accident; next, compare the negligence or fault of the parties by determining in what proportion, figured in percentage, Plaintiff's own fault contributed as a proximate cause of all damages suffered by the Plaintiff, as a proximate result of the accident; the Court will then reduce the full amount of Plaintiff's damages, by subtracting a sum equal to the percentage of the total you find, from a preponderance of the evidence in the case, was caused by Plaintiff's contributory negligence.

INSTRUCTION NO. 25

If you find that the Plaintiff, Charles A. Nichols, has had actual damages, then you must consider whether the Defendant, Burlington Northern Santa Fe Railway Company, has proved its affirmative defense of Plaintiff's failure to mitigate

or minimize damages. The Plaintiff has the duty to take reasonable steps under the circumstances to mitigate or minimize his damages. Damages, if any, caused by Plaintiff's failure to take such reasonable steps cannot be awarded to the Plaintiff.

This affirmative defense is proved if you find all of the following have been proven by a preponderance of the evidence:

1. That the Plaintiff was physically able to look for appropriate work, and;
2. That Plaintiff had increased damages because he had not sought alternative employment or attempted to further his education.

If you find that any one or more of these propositions has not been proved by a preponderance of the evidence, then you shall make no deduction from Plaintiff's damages.

On the other hand, if you find that these propositions have been proved by a preponderance of the evidence, then you must determine the amount of damages caused by the Plaintiff's failure to take such reasonable steps.

INSTRUCTION NO. 26

The Defendant railroad has a duty to exercise reasonable care so as not to aggravate a known weakened physical condition or disability in an employee by assigning that employee work which the Defendant knows, or in the exercise of reasonable care should know, would aggravate or cause injury to such employee because of the known weakened physical condition or known disability.

INSTRUCTION NO. 27

An unemployed plaintiff who is able to look for work does not satisfy his duty to mitigate by waiting passively for employment to be offered. The opportunity to mitigate is not

merely the opportunity to accept a job, but the opportunity so seek appropriate work when one is able to do so.

INSTRUCTION NO. 28

For the Plaintiff, Charles A. Nichols, to recover damages for the aggravation of a preexisting condition, you must find all of the following have been proved:

1. Before November 7, 1999, the Plaintiff had preexisting condition in his right knee and lower back.

2. On November 7, 1999, the Defendant, Burlington Northern Santa Fe Railway Company, was negligent.

3. The Defendant's negligence made the Plaintiff's condition worse.

If you find that all of these three statements have been proved by a preponderance of the evidence, it is your duty to determine, if possible, the amount of damages, if any, caused only by the negligence of the Defendant.

If you are able to separate the amount of damages, if any, caused by the negligence of the Defendant from the amount of damages, if any, caused by the ailment or disability which existed before November 7, 1999, then the Plaintiff is entitled to recover damages caused only by the negligence of the Defendant.

If you are unable to separate the damages caused by the ailment or disability which existed before November 7, 1999 and the damages caused by the negligence of the Defendant, then the Defendant is legally responsible for the entire amount of damages.

INSTRUCTION NO. 29

If you should find that the Plaintiff is entitled to a verdict, and further find that the evidence in the case establishes either: (1) a reasonable likelihood of future medical expense,

or (2) a reasonable likelihood of loss of future earnings, then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the Plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which he or she would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the Plaintiff could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present worth—the reduced amount—of anticipated future loss.

INSTRUCTION NO. 30

If you should find that the Plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include:

First, loss of earnings, if any, shown by the evidence in the case to have been necessarily lost up to date by the Plaintiff since the injuries, because of being unable to pursue his occupation, as a result of the injuries.

Second, also such sum as will reasonably compensate the Plaintiff for any future wage loss or impairment of earning capacity caused by the injuries in question, which you find

from the evidence in the case that Plaintiff is reasonably probable to suffer in the future. In determining this amount, you should consider what Plaintiff's health, physical ability and earning power were before the incident and what they are now; the nature and extent of his injuries, whether or not they are reasonably probable to be permanent; or if not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his injuries upon his future earning capacity, and second, the present value of any impairment of earning capacity or future wage loss, which you find from the evidence in the case that Plaintiff is reasonably probable to suffer in the future, as a result of the injuries in question.

INSTRUCTION NO. 31

At the beginning of this trial, Plaintiff Charles A. Nichols, had a life expectancy of 35.2 years. This expectancy is taken from the tables of life expectancy which are part of the Colorado law. This table of life expectancy is not conclusive but may be considered together with other evidence relating to the Plaintiff's health, habits and occupation.

INSTRUCTION NO. 32

The fact that an instruction on measure of damages has been given to you does not mean that the Court is instructing the jury to award or not to award damages. The question of whether or not damages are to be awarded is a question for the jury's consideration.

Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your best judgment based on the evidence.

INSTRUCTION NO. 33

Damages must be reasonable. If you should find that the Plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury

and damage as you find, from a preponderance of the evidence in the case, that he has sustained as a proximate result of the accident.

You are not permitted to award speculative damages. So, you are not to include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.

INSTRUCTION NO. 34

If you find for plaintiff you should compensate him for any bodily injuries and any resulting mental and physical pain and suffering, mental anguish, disability, impairment of ability to enjoy life, impairment of self-esteem or self-image experienced in the past and which you find from the evidence that he probably will suffer in the future from the injuries in question. No evidence of the value of such intangible things as mental and physical pain and suffering, mental anguish, impairment of ability to enjoy life or impairment of self-esteem has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in the light of the evidence.

INSTRUCTION NO. 35

If your verdict is for Plaintiff it should include the reasonable value of hospitalization, medical care, treatment, and vocational rehabilitation expenses necessarily or reasonably to be obtained by the Plaintiff in the future.

INSTRUCTION NO. 36

In considering the amount of damages, if any, to be awarded, you are instructed that any recovery by the Plaintiff in this action will not be subject to federal or state income taxes.

INSTRUCTION NO. 37

Once you begin your deliberations, if you have a question about the evidence in this case or about the instructions or verdict forms that you have been given, your Foreperson should write the question on a piece of paper, sign it and give it to the bailiff, who will bring it to me.

I will then confer with the attorneys as to the appropriate way to answer your question. However, there may be some questions that, under the law, I am not permitted to answer. If it is improper for me to answer the question, I will tell you. Please do not speculate about what the answer to your question might be or why I m [*sic*] not able to answer a particular question.

INSTRUCTION NO. 38

The original form of the written instructions and the exhibits are a part of the court record. Do not place any marks or notes on them.

The bailiff will now escort you to the jury room. After you get to the jury room you shall select one of your members to be the foreperson of the jury. That person will be in charge of your discussions. You must all agree on your verdict, and you must all sign the original form of whatever verdict you reach.

Please notify the Bailiff when you have reached a verdict, but do not tell the Bailiff what your verdict is. You shall keep the verdict form, these instructions and the exhibits until I give you further instructions.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed Oct. 14, 1994]

No. 93-CB-854

STEVEN V. SAUER,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,
Defendant.

SPECIAL VERDICT FORM ONE

First Cause of Action: January 6, 1992.

QUESTION NO. 1: Was the Defendant negligent?

ANSWER: No (yes or no)

If your answer is "no", your verdict is for the Defendant. Your Foreman/Forewoman should date and sign the Verdict Form below and you should notify the bailiff that you have reached a verdict.

QUESTION NO. 2: If your answer to Question No. 1 was "yes," did that negligence have some causal connection, in whole or in part, with the Plaintiff's injuries?

ANSWER: _____ (yes or no)

If your answer is "no", your verdict is for the Defendant. Your Foreman/Forewoman should date and sign the Verdict Form below and you should notify the bailiff that you have reached a verdict.

QUESTION NO. 3: If your answer to Interrogatory No. 2 is "yes," was the Plaintiff negligent?

ANSWER: Yes (yes or no)

QUESTION NO. 4: If your answer to Question No. 3 is "yes" taking as 100 percent the combined negligence of the Defendant and the Plaintiff, what percentage of the negligence was the Defendant's and what percentage was the Plaintiff's?

ANSWER: _____

Percentage charged to the Defendant: 50%

Percentage charged to the Plaintiff: 50%

MUST TOTAL 100%

QUESTION NO. 5: What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury he received?

ANSWER: $68,904

QUESTION NO. 6: What percentage of the damages determined in Question No. 5 above are attributable to a pre-existing condition or to the Plaintiff's previous or subsequent accidents?

ANSWER: 75%

Dated this 14th day of October, 1994.

/s/ [Illegible]
Foreman/Forewoman

APPENDIX J

COLORADO COURT OF APPEALS
Two East 14th Avenue
Denver, Colorado 80203

Case No. ____

CHARLES A. NICHOLS,
Plaintiff-Appellant,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

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Laura E. Schwartz, Atty. No. 26044
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Appeal from the District Court, City and County of Denver
The Honorable Michael A. Martinez, Presiding
Civil Action No. 00 CV 4787

NOTICE OF APPEAL

COMES NOW Plaintiff-Appellant Charles A. Nichols, by and through his attorneys, ROBERTS LEVIN & PATTERSON, P.C., and LAW OFFICES OF MARTIN E. JACKSON, P.C., and hereby submits his Notice of Appeal from the trial court's Order of Judgment reducing the jury's award of damages.

I. NATURE OF THE CASE

A. Nature of the Controversy.

Plaintiff-Appellant Charles A. Nichols ("Mr. Nichols"), a locomotive engineer with over 20 years of employment with Defendant-Appellant Burlington Northern and Santa Fe Railway Company ("BNSF"), filed this action on June 30, 2000, seeking monetary damages for a cumulative traumatic injury to his neck and cervical/thoracic spine caused by his work pursuant to 45 U.S.C. § 51, *et seq.*, the Federal Employer's Liability Act ("FELA") and 49 U.S.C. § 20701, the Locomotive Inspection Act (the "LIA"), alleging that the locomotives upon which he was required to work were defective in that they were unsafe as contemplated under the LIA and caused Mr. Nichols the injuries to his cervical and thoracic spine. In addition, he made claim under FELA for separate injuries to his lumbar spine and knee sustained in a work accident which occurred on November 7, 1999 when he fell from a locomotive.

Mr. Nichols settled the cumulative trauma injury portion of his claim, and his remaining claim for damages arising out of the November 1999 work accident due to BNSF's negligence in returning him to work while unfit was tried to a jury. On September 18, 2003, the jury returned a verdict in favor of Mr. Nichols and awarded him damages of $800,000. Relying on answers to special interrogatories in a verdict form, the trial court decreased the verdict by 30% for Mr. Nichols'

contributory negligence to $560,000. The trial court then further reduced the $560,000 by another 70% to $168,000, citing the jury's response to a special interrogatory in the verdict form included in the verdict form over Mr. Nichols' objection about a pre-existing condition.

B. Orders Appealed.

On September 22, 2003, also over Mr. Nichols' objection, the trial court entered a written Order of Judgment reducing the jury's $800,000 award further to $164,950.86.[1] The only portion of that Order being appealed is the double reduction for a pre-existing injury, and Mr. Nichols seeks remand of this matter for reinstatement of the $560,000 damage award. Mr. Nichols also conditionally appeals several bench rulings made during trial that excluded expert testimony about his economic damages.

C. Finality Of Judgment.

This judgment is final for purposes of appeal pursuant to C.R.C.P. 54(a) and C.R.S. § 13-3-102. Mr. Nichols appeals from the trial court's order and invokes this Court's jurisdiction pursuant to C.A.R. 3(a) and 4(a).

D. Post-Trial Motions.

On September 19, 2003, BNSF filed a Brief in Regard to the Net Jury Verdict. Also on September 19, 2003, Mr. Nichols filed a Motion for Entry of Judgment. The trial court decided both motions and entered its Order of Judgment slashing the jury award on September 22, 2003, the Order now being appealed from. Mr. Nichols filed his Motion for Bill of Costs on September 30, 2003. On October 6, 2003, BNSF filed Defendant's Objection to Plaintiff's Bill of Costs to which Mr. Nichols replied on October 14, 2003. On

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[1] The trial further reduced the jury award by an additional $3,049.14 as the result of an uncontested Amended Motion for Credits, and entered judgment against BNSF in the amount of $164,950.86. That reduction is not at issue in this appeal.

October 16, 2003, the trial court granted Plaintiff's Motion for Bill of Costs, entered judgment against BNSF, and awarded Mr. Nichols his costs in the amount of $20,029.

E. Motions For Enlargement Of Time To File Notice Of Appeal.

None.

II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

A. Did the trial court err, as a matter of law, when it submitted special interrogatories to the jury concerning what percent of Plaintiff's, "*condition*" was attributable to a pre-existing condition and then reducing the amount of Plaintiff's *damages* which the jury found were caused by the November 1999 work accident?

B. Did the trial court err, as a matter of law, in reducing Plaintiff's damages by the percentage amount of his condition the jury found to be pre-existing when the presence of pre-existing injuries was an element of Plaintiffs claim already considered by the jury in determining that the Defendant was negligent in ordering that Plaintiff return to work while physically unfit for safe duty, and the jury was not instructed that any award to Plaintiff would be reduced by that percentage?

C. If the jury instructions and the Special Verdict Form were ambiguous when read together, did the trial court err in failing to find that ambiguity invited by Defendant and to resolve it in Plaintiff's favor as required by FELA and by the fact that it arose from the verdict form tendered by Defendant and submitted to the jury over Plaintiff's objection?

Only if this Court remands the case for a new trial should the following evidentiary issues be considered:

D. Did the trial court abuse its discretion in excluding testimony from Plaintiff's expert on economic damages about the value of a spousal annuity?

E. Did the trial court abuse its discretion in excluding testimony from Plaintiff's expert on economic damages as to the value of a Tier 2 defined benefit retirement plan?

F. Any other properly preserved issues that are revealed after reviewing the record.

III. TRANSCRIPTS OF TESTIMONY

A complete transcript of the trial is necessary. The reporter is Julie Lord. The length of the transcript is estimated as 1,800 pages.

IV. PRE-ARGUMENT CONFERENCE

Plaintiff-Appellant does not request a pre-argument conference.

V. COUNSEL FOR THE PARTIES

Plaintiff-Appellant is represented by:

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Defendant-Appellee is represented by:

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303-628-3300

VI. APPENDIX

The attached Appendix contains:

1. Jury Verdict entered September 18, 2003.
2. Order of Judgment dated September 22, 2003.

DATED this 5th day of November 2003.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF-APPELLANT
CHARLES A. NICHOLS

APPENDIX K

COLORADO COURT OF APPEALS
Two East 14th Avenue
Denver, Colorado 80203

[Filed APR 14, 2006]

Case No. 2003CA2145

CHARLES A. NICHOLS,
Plaintiff-Appellant and
Cross-Appellee,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
Defendant-Appellee and
Cross-Appellant.

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Appeal from District Court, City and County of Denver
The Honorable Michael A. Martinez, Presiding
Civil Action No. 00 CV 4787

PLAINTIFF-APPELLANT'S AMENDED PETITION FOR REHEARING ON THE COURT'S RULING ON THE PRE-EXISTING CONDITION ISSUE

Judgment Affirmed—Announced: March 23, 2006
Opinion by: Judge Carparelli, Division IV
Roy and Russel, J.J., concur

COMES NOW Plaintiff-Appellant and Cross-Appellee, Charles A. Nichols ("Nichols"), pursuant to C.A.R. 40, and hereby submits his Petition for Rehearing of this Court's March 23, 2006 opinion.

PETITION FOR REHEARING

The panel overlooked and misapprehended points of law and facts of record in affirming the trial court's judgment that reduced the jury's damage finding of $800,000, not only by the required 30% reduction for contributory negligence, but by an additional 70%, based on the jury's answer to a question concerning what percentage of plaintiff's "condition" was attributable to a pre-existing "condition," a question that never should have been asked and the answers to which were obviously superfluous when viewed in the context of the record.

A. In Reaching Its Decision, the Panel Overlooked the Following Undisputed Facts of Record and Points of Law.

1. The theory on which Plaintiff's claim was tried was that the railroad acted negligently in returning Mr. Nichols to work without restrictions and resulted in the November 7, 1999 fall at work.

2. The fall aggravated a pre-existing condition causing Mr. Nichols to become permanently disabled from performing his occupation as a railroad engineer.

3. Congenital weakness in plaintiff's knee and lower back was the pre-existing "condition" aggravated by the fall.

4. Prior to the accident, the pre-existing "condition" was unknown, latent, asymptomatic and causing Mr. Nichols no harm or damages.

5. The forces of the accident, acting on the pre-existing "condition," caused Mr. Nichols to suffer severe injuries that permanently disabled him from engaging in his occupation as a railroad engineer.

6. There was no evidence of record that, absent the November 1999 fall, the pre-existing "condition" would inevitably have caused Mr. Nichols any damages at all, let alone totally and permanently disabling him from pursuing his occupation as a railroad engineer. ***Sauer v. Burlington No. Rd. Co.***, 106 F.3d 1090 (10th Cir. 1996) was thus inapposite.

7. The $800,000 awarded by the jury therefore cannot be said to include "damages" for a pre-existing "condition" because, until the accident, no damages had been sustained, and but for the accident, there would have been no damages.

8. Mr. Nichol's economic losses, alone, caused by the accident were in the range of $605,490 to $902,328.

9. Unlike Colorado state court claims, FELA places no artificial limitations on the amount a jury may award for non-economic damages.

10. Under governing United States Supreme Court law, a damage award to a FELA plaintiff is subject only to one apportionment that may result in a reduction of the award—comparative negligence of the employee. 45 U.S.C. § 53; ***Norfold & Western Ry. Co. v. Ayers***, 538 U.S. 135 (2003).

11. There is no issue as to the correctness of the instructions given to the jury.

12. The jury instructions directed the jury that any damages awarded had to be a direct result of the November 7, 1999 accident and could not include any amount attributable to a pre-existing "condition" not caused by the Defendant. Instructions Nos. 5, 23, 24, 26, 28 & 33.

13. The court must presume that the jury properly followed the instructions given. ***O'Neal v. Reliance Mort. Corp.***, 721 P.2d 1230, 1233 (Colo.App. 1986).

14. Instruction No. 24 explained to the jury how to compare the negligence of the parties should they return a verdict in favor of the Plaintiff: "*first*, determine the full amount of all damages sustained by the Plaintiff, as a proximate result of the accident . . . ."

15. Question 2 in the Verdict Form asks if the Defendant's negligence was "a cause of any of the injuries, damages or losses claimed by Plaintiff on November 7, 1999?"

16. Question 4 asks the same question as to Plaintiff's negligence: was it a "cause of any of his own claimed injuries on November 7, 1999?"

17. Question 6 asks, without regard to offset for comparative negligence, what amount "will fairly and adequately compensate the Plaintiff for the injury?" The "injury" can only be a reference to the injury sustained on November 7, 1999 in the context of these questions.

18. Question 7 asks, "what percentage of Plaintiff's condition is attributable to a pre-existing condition, if any?" It contains no reference to "damages," "causation," or to "November 7, 1999."

B. The Panel's Opinion Did Not Reconcile the Jury's Answers to the Special Verdict Form Questions; Rather, It Reconciled What the Trial Court Did with Those Answers.

At page 12 of the slip opinion, the panel stated that it "must attempt to reconcile a jury's answers to special verdict questions if we can do so based on the evidence and the instructions given," citing ***Kepley v. Kim***, 843 P.2d 133 (Colo.App. 1992); ***Lonardo v. Lipvac Meat Co.***, 676 P.2d 1229 (Colo.App. 1983). This is not what the panel did, however.

The instructions directed the jury to find damages only for injuries sustained in the November 7, 1999 accident caused by the railroad's negligence, exclusive of any amount for a condition not caused by the railroad. The Special Verdict Form, through Question 6 was consistent with those instructions. The answers following Question 6 were thus superfluous and should have been ignored by the trial court. ***See, e.g., Carr v. Wal-Mart Stores, Inc.***, 312 F.3d 667, 672-75 (5th Cir. 2002), *citing* ***White v. Grinfas***, 809 F.2d 1157 (5th Cir. 1987). Giving effect to the answer to questions that never should have been asked, particularly when those answers are rendered superfluous and irrelevant when considered in the context of the evidence, the instructions, and the answers to the proper questions preceding them, with all due respect, does not constitute reconciling a jury's findings, but rather, amounts to a deconstruction of the consistency of the jury's original findings.

The jury was properly instructed, and neither party objected to the instructions given. Those instructions plainly informed the jury that, in assessing the amount of damages to be awarded, no dollar amount attributable to a pre-existing condition could be included.

The evidence indisputably supported a damage award of $800,000 as compensation for the damages caused by the railroad's negligence in aggravation of Plaintiff's pre-existing but non-disabling condition. Plaintiff's counsel argued for a verdict range between $750,000 and $950,000 to compensate for those damages. Assuming that the jury followed the instructions, as the trial court and this court must, it must be concluded that the figure included no damages for a pre-existing condition.

The Court's observation, Opinion at 8-9, that if $800,000 represents damages only for aggravation of pre-existing conditions, then Plaintiff's total damages, including his pre-existing condition, must have been $2.5 million misses the mark. The pre-existing condition was asymptomatic and caused no damages. The panel improperly equated a latent and asymptomatic condition with damages.

This Court's opinion presumes that the jury did not follow the stipulated instructions given by the court and reconciled, not the answers on the verdict form, but what the trial court did with those answers. The answers in the jury verdict form, when considered in relation to the instructions as a whole and the evidence of record, are not inconsistent. The questions as to pre-existing condition and mitigation of damages should not have been on the verdict form in the first place, and once asked, the answers should have been disregarded. A refusal to reduce the damage award a second time by the 70% answer to question 8 would not have rendered the jury's findings inconsistent or ignored an essential finding.

CONCLUSION

There was but one—and only one—finding of damages in this case for the injuries caused by the November 7, 1999 accident—$800,000 (in answer to Question 6). The answers to Questions 7 and 8 were irrelevant and superfluous in light of the previous six answers and the record in the case. Finally, interpreting what occurred below as justifying a

double reduction of Plaintiff's FELA verdict contravenes governing United States Supreme Court precedent and undermines the essential purpose of FELA's historically-recognized remedial nature.

WHEREFORE, for the reasons above stated, Plaintiff-Appellant and Cross-Appellee respectfully request this honorable court to grant his Petition for Rehearing, reconsider the decision approving a double reduction of this FELA Plaintiffs damage award, reverse the decision below and remand this matter to the trial court with directions to enter judgment for Plaintiff in the amount of $560,000, with post-judgment interest, to award costs of this appeal, and such other and further relief as the court deems proper under the circumstances.

DATED this 14th day of April 2006.

Respectfully submitted,

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APPENDIX L

COLORADO SUPREME COURT
Court Address: 2 E. 14th Avenue
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06-SC-413

CHARLES A. NICHOLS,
Petitioner,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
Respondent.

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Colorado Court of Appeals
Judges Carparelli, Roy and Russell, JJ.
Case No.: 03 CA 2145

Appeal from the District Court, City and County of Denver Trial Court Judge: The Hon. Michael A. Martinez
Case Number: 00 CV 4787

PETITION FOR CERTIORARI

COMES NOW Petitioner, Charles A. Nichols, Plaintiff-Appellant below (hereinafter "petitioner" or "plaintiff"), and petitions the Court to exercise its sound judicial discretion in favor of reviewing the published opinion issued by the Court of Appeals in this case, and AS GROUNDS THEREFOR, states the following:

I. ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

1. Whether the decision below contravened the express terms of the Federal Employer's Liability Act, 45 U.S.C. §§ 51-59 ("FELA"), and the United States Supreme Court's governing precedent construing that Act, and deprived Petitioner of his right to trial by jury by allowing the net damage verdict below to be reduced by a second apportionment not provided for in FELA?

2. Whether the Court of Appeals erred in failing to respect the jury's only finding on damages by giving effect to answers to superfluous questions that called for irrelevant information that could not bear on the issue of damages contrary to governing Unites [*sic*] States Supreme Court precedent?

3. Whether the Court of Appeals erred in failing to adhere to the principles that a reviewing court must presume that a jury followed the instructions given, and harmonize

answers to special verdict form questions to effectuate the jury's intent?

II. OPINION BELOW

Petitioner seeks this Court's review of the opinion below, *Nichols v. Burlington No. & Santa Fe Ry. Co.*, __ P.3d __, 2006 W.L. 774847 (Colo.App. 2006) (copy attached as **Appendix A**), entered on March 23, 2006. Petition for Rehearing was denied on May 25, 2006. Petitioner requested an enlargement of time to July 7, 2006 within which to file this Petition but misfiled that request in the court below. On June 28, 2006, Petitioner filed in this Court his motion to accept the misfiled request for enlargement or to grant the requested enlargement under C.A.R. 56. That motion remains pending.

III. GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction to grant certiorari review of the attached opinion by authority conferred by *Colo. Const., Art. VI § 3 (1996), C.R.S. §§ 13-4-108* and *C.A.R. 49*. Petitioner seeks review of only part "II. Damages" of the decision below.

Review by certiorari is appropriate in this case. In sanctioning a second apportionment of damages, the decision is contrary to FELA's plain terms that allow only one apportionment -- for comparative negligence -- as construed by the United States Supreme Court. The decision deprived Petitioner of 70% of his verdict in violation of his Seventh Amendment right to trial by jury by giving effect to irrelevant answers not bearing on damages. If allowed to stand, the decision has the potential for creating confusion in the trial of FELA cases, not only in Colorado, but throughout the country, and could seriously undermine the Act's policy of liberal recovery. In approving the double reduction of damages, the court decided this case in a manner contrary to established principles of appellate law and FELA's remedial purposes.

IV. STATEMENT OF THE CASE

A. Nature of the Case.

Petitioner, an engineer employed by the Burlington Northern and Santa Fe Railway Company ("BNSF"), sustained permanently disabling injuries to his lower back and right knee in an accident on November 7, 1999 when he fell ten feet to the ground while attempting to board a locomotive for a job assignment.

In June 2000, he filed this action under FELA, stating a claim for negligent work assignment based on the November 1999 accident and a second claim for cumulative injuries to his upper back and neck.

B. Prior Appeal.

In June 2001, the trial court granted BNSF's motion for summary judgment, dismissing plaintiff's claims as time-barred by FELA's three-year statute of limitations and plaintiff appealed.

On August 1, 2002, the Court of Appeals reversed the trial court judgment and remanded the case for trial on the merits. *Nichols v. Burlington No. & Santa Fe Ry. Co.*, 56 P.3d 106 (Colo.App. 2002).

C. Disposition at Trial.

On September 15, 2003, plaintiff's claim for negligent work assignment (the cumulative injury claim settled prior to trial) proceeded to trial by jury.

Rejecting the standard FELA verdict form tendered by plaintiff (**Appendix B** at 4-5), the trial court, over plaintiff's objection, used Special Verdict Form B tendered by BNSF. **Appendix B** at 1-3. That form contained the following pertinent questions:

* * *

> 6. [W]hat amount do you find, without any reduction for any negligence which you may find on the Plaintiff's

part, will fairly and adequately compensate the Plaintiff for the injury?

ANSWER: $800,000

7. [I]s all or part of Plaintiff's *condition* attributable to a *pre-existing condition*?

ANSWER: yes

8. [W]hat percentage of Plaintiff's *condition* is attributable to a *pre-existing condition*?

ANSWER: 70%

9. Did Plaintiff fail to mitigate his *damages*?

ANSWER: No

10. [W]hat amount of . . . *damages* expressed in dollars *as determined in response to Question No. 6* do you find could have been avoided . . . had [Plaintiff] taken reasonable steps to mitigate his *damages*?

ANSWER: [none] (line left blank)

App. B at 3. Questions 7-10 were superfluous to the questions of liability and damages.

On September 18, 2003, the jury found in favor of plaintiff, apportioning negligence 70% to BNSF and 30% to Plaintiff. The jury awarded damages of $800,000 without reduction for comparative negligence. The trial court declined plaintiff's request that judgment enter on the verdict in the net amount of $560,000, discharged the jury, and directed the parties to brief the issue as to whether the jury's award should be reduced only by the 30% comparative finding or also by the 70% answer to Question 8.

On September 22, 2003, the trial court issued its order (**Appendix C**) denying plaintiff's written motion for judgment, and after reducing the damage award by 30% for comparative negligence, reduced that net amount by 70%

based on the answer to Question 8. Relying on *Sauer v. Burlington No. R. Co.*, 106 F.3d 1490 (10th Cir. 1996), the court concluded that not to reduce the award again would ignore the jury's "complete findings." This appeal ensued seeking entry of judgment in the full net amount of $560,000.

D. The Decision As To Which Review Is Sought.

Though recognizing that the combination of the instructions and the "special verdict form are not models for future use," the court below concluded that the reduction in damages based on Questions 7 and 8 was not error. **App. A** at 12. The court, in what it termed, an attempt to reconcile the answers based on the record and the instructions, concluded that "the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the railroad's negligence or for pre-existing conditions." **App. A** at 13. This finding rested on the placement of the pre-existing apportionment question (following the total damage question) and rejection of the argument that the $800,000 number represented the damages caused only by the railroad's negligence, reasoning that if such were the case, then the jury's assessment of total damages must have been $2.5 million. Finding that the record could not sustain any award over $1 million, the court reiterated its finding that "the jury did not adjust the compensation amount reflected in the response to question six based on its determination of the relative effect of pre-existing conditions and the railroad's negligence." **App. A** at 14.

V. ARGUMENT

The decision below is contrary to FELA's plain terms as construed by the United States Supreme Court. The reduction of damages by a second apportionment was contrary to the instructions given, the evidence, and established appellate principles. The Court of Appeals sanctioned prohibited fact finding when it determined that 70% of the jury's finding of

total damages in answer to Question 6, contrary to the instructions and the question itself, included an amount for pre-existing damages. By reducing the jury's only finding on the issue of damages a second time, the lower court deprived Petitioner of his full award, and violated his Seventh Amendment right to trial by jury. These errors warrant this Court's exercise of its power to honor the properly instructed jury's only damage finding and afford Petitioner the judgment to which he is entitled.

A. FELA Permits Only One Apportionment That Can Reduce Damages Awarded under FELA—Comparative Negligence.

Questions concerning damages awarded under FELA involve substantive rights and are resolved under federal law. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988). Judicial determinations touching on damages are resolved under the "federal common law of negligence under FELA, informed by reference to the evolving common law." *Ayers*, 538 U.S. at 145 (*citing Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 558 (1994).

This matter squarely presents the issue of whether FELA damage awards can be reduced by any apportionment other than that expressly required by the statute—for contributory negligence. The Supreme Court answered this question with a resounding "no" in *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 161 (2003), holding that *45 U.S.C. § 53* directs "apportionment of responsibility between employer and employee based on comparative fault. The statute *prescribes no other apportionment*." (citation omitted; italics added).

FELA is a remedial statute that should be liberally construed to shift "part of the 'human overhead' of doing business from employees to their employers." *Ayers*, 538 U.S. at 145. FELA's remedial nature facilitates recovery under a

liberal standard for establishing liability. *Stevens v. Bangor & Aroostook R. Co.*, 97 F.3d 594, 597-78 (1st Cir. 1996). The employer must pay for damages "whenever the negligence of the employer plays any part in causing such injuries." *Herrera v. San Luis Cent. R. Co.*, 997 P.2d 1238, 1240 (Colo. App. 1999) (*citing Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957)).

In Part III of the *Ayers* decision, a unanimous Court held that a railroad worker is entitled to all damages proximately caused by a railroad's negligence and that reducing damages by apportionment of fault to other tortfeasors is impermissible: "Nothing in the statutory text instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third-party also contributed in part to the injury-in-suit." *Ayers*, 538 U.S. at 160. "[T]o narrow employer liability" by allowing a further reduction in damages is "both unprovided for by the language of the FELA and inconsistent with the Act's overall recovery facilitating thrust." *Id.* at 161.

The fact that *Ayers* dealt with a railroad's claim of a right to reduce FELA damages by negligence apportioned to nonparties (as opposed to preexisting conditions) does not detract from the opinion's governance of the issue at hand. "[T]he parallel between aggravation of a pre-existing condition and the harm caused by multiple tortfeasors has been drawn by several courts." *Stevens v. Bangor & Aroostook R. Co.*, 97 F.3d 594, 602 fn.9 (1st Cir. 1996). The *Ayers* opinion is clear: no other reduction except that expressly permitted by the statute is allowed. Damage awards are made by taking preexisting conditions, if any, into account before an amount is reached, not by a second apportionment. Courts have approved rejection of verdict forms containing questions like those at issue here. In *Norfolk So. Ry. Co. v. Bradley*, 772 So.2d 1147 (Ala. 2000), the court recognized that to ask the jury to assess the amount of damages that would fairly

compensate the plaintiff for his injuries and then to assess a percentage of those injuries to preexisting conditions or to other unrelated accidents would be confusing, misleading, and "inconsistent and present an incorrect basis for determining damages," *id.* at 1152, a particularly true statement when the jury is specifically charged (as it was here) that it could award only damages proximately caused by the railroad's negligence and could not include any amount for preexisting conditions or separate accidents.

In *Worthy v. Norfolk & Western Ry. Co.*, 619 N.E.2d 1371, 1375-76 (Ill. App. 1993), the court approved rejection of a jury question calling for a percentage apportionment of damages to preexisting conditions. The court recognized that while "at first glance" such questions may "appear to relate to the issue of aggravation, taken as a whole, they relate to the issue of reduction of damages." *Id.* Noting that the function of such special interrogatories is "to check the jury's understanding of the case by comparing the verdict to its conclusions with the ultimate facts," the court concluded that the rejected "questions did not fill that purpose and were properly rejected by the trial court." *Id.*

To allow the decision below to stand will cause confusion in the trial of FELA cases, not just in Colorado, but throughout the country. This Court, following *Ayers*, should take this opportunity, consistent with the letter and spirit of FELA and *Ayers*, to disapprove any apportionment question other than one for comparative negligence.

B. The Court Below Disregarded the Jury's Only Damage Finding Contrary to Governing Law.

In *Gallick*, 372 U.S. 108, the Supreme Court granted certiorari review of a state appellate decision "to consider the question whether the decision below [setting aside a jury verdict in favor of plaintiff due to insufficient evidence on causation] improperly invaded the jury's function." *Id.* at 109.

Based on answers to 24 special interrogatories, the trial court entered judgment for the plaintiff for injuries arising out of an insect bite. The bite caused a wound that became infected; unresponsive to treatment, the infection spread throughout plaintiff's body leading to amputation of his legs. *Id.* Based on two "no" answers as to whether the railroad should have foreseen an injury of this type, the state appeals court set aside the verdict because the evidence was based on guesswork, speculation, and was too tenuous to support a finding of liability. *Id.*

Recognizing that reasonable forseeability of harm is a necessary element of liability under FELA, the Supreme Court nonetheless concluded that, despite the negative answers, the forseeability requirement had "been satisfied in the present case by the jury's finding . . .," *id.* At 117-18, declaring that:

> But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interro gatories consistent, they must be resolved that way'. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's special verdict and remand the case for a new trial.

Id. at 119 (citations omitted). The Court reversed the appellate decision as "depriving petitioner of the judgment entered upon the special verdict of the jury," *id.* at 122. Because FELA law allows recovery of damages where a railroad is liable if its negligence played even the "slightest part" in causing injury and permits compensation "for even the improbable or unexpectedly severe consequences," the Court concluded that the negative answers were not controlling. *Id.* at 120.

Second, based on an instruction to take the railroad's past experience into account and the fact that it was not aware of any previous occurrence, the Court observed that the jury may have concluded that the defendant had no reason to anticipate the injury and therefore applied "too narrow a concept of foreseeable harm" to preclude its finding of negligence under FELA. *Id.* at __. Looking at the negative answers in the context of "the charge and the total context of the special verdict," the Court concluded that these immaterial answers could not be assigned "sufficient weight to warrant overturning the judgment of the trial court entered pursuant to the jury's special verdict." *Id.*

This Court cited *Gallick* with approval in *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (1982), holding that "[a]n appellate court has duty to attempt to reconcile the jury's answers to special verdicts if it is at all possible." Where the record supports a view of the case that make a jury's answers consistent, the answers must be reconciled that way. *Id., citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).

Here, the lower court reached the opposite result by flawed reasoning. First, it proceeded on the incorrect assumption that the questions called for answers to legitimate questions and should have been asked. Second, it impliedly found the answers to Questions 6 and 8 inconsistent—*i.e.*, that they could not stand together unless the damages were reduced.

The court's attempt to reconcile the jury's answers was based on the premise that Questions 7 and 8 sought findings on an issue essential to Petitioner's proof of his claim. This begs the question by assuming that the answers to these questions were necessary to resolve a legitimate issue in the case. The court assumed that Question 8 was a statement on damages by the jury. But it was not.

This error resulted from the court's misperception of the nature of Plaintiff's claim and disregard of undisputed

evidence of record. Plaintiff's claim was based upon the railroad's negligence in returning Petitioner to work without restrictions, given its knowledge of weakness in his right hand. It was this pre-existing condition on which the claim was based. The pre-existing conditions which manifested into total disability as a result of the accident were congenital, latent, and asymptomatic conditions of which the railroad—and Petitioner—were unaware. The case presented an egg-shell plaintiff situation where more severe injuries occurred due to conditions in Petitioner's body.

Moreover, because the congenital conditions were asymptomatic, they were not the cause of any "damages" antedating the accident. The record is devoid of any evidence that the congenital conditions would inevitably have led to Petitioner's permanent disability even without the railroad's negligence.

The *Sauer* case, 106 F.3d 1490, relied on by both courts below, was wholly inapposite to the claim and factual record in this case. *Sauer* involved a pre-existing condition that would inevitably have caused plaintiff's injuries without railroad negligence. Further, the apportionment question in that case specifically referred to "damages."

"An instruction which misleads or confuses the jury amounts to error," and prejudicial error "exists when the record shows that a jury might have answered differently if a proper instruction had been given." *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375, 1378-79 (Colo. App. 1996), *cert. denied* (1996) (citations omitted). If Question 8 had referred the jury to Question 6, its answer to Question 7 would likely have been "no" with no necessity to answer Question 8. Questions 7 and 8 should not have been asked in this case.

C. The Court of Appeals Failed to Presume that the Jury Adhered to the Instructions Given

In reviewing a jury's verdict, an appellate court must presume that the jury followed the instructions. *O'Neal v.*

Reliance Mort. Corp., 721 P.2d 1230, 1233 (Colo. App. 1986). Looking at the instant instructions and verdict form with this precept in mind leads to but one conclusion—that the answer to Question 6 constituted the jury's only finding of damages and *did not* include any amount allocable to losses for a "pre-existing condition."

The instructions directed the jury to find damages only for injuries sustained in the November 1999 accident caused by the railroad's negligence, exclusive of any amount for a condition not caused by the railroad. Question 8 makes no reference to "damages." It referred only to plaintiff's "condition" and "pre-existing condition." Compare the wording of Question 10, which expressly refers to "damages . . . as determined in response to Question No. 6." The wording of the mitigation questions which refer to "damages" makes clear that Question 8, relating only to "conditions," gave no hint that the answer to it could reduce the jury's intended award. Unlike comparative negligence, there was no instruction that advised the jury of the possible effect the answer to Question 8 could have on damages.

The Special Verdict Form, through Question 6, was consistent with those instructions, but the answers following Question 6 were superfluous to the properly instructed question of damages and should have been ignored by the trial court. *See, e.g., Carr v. Wal-Mart Stores, Inc.*, 312 F.3d 667, 672-75 (5th Cir. 2002), *citing White v. Grinfas*, 809 F.2d 1157 (5th Cir. 1987). Answers to questions that, by their express terms make no reference to "damages," are irrelevant and should not have been considered. Giving them effect in the context of the evidence, the instructions, and the answers to the proper questions preceding them, does not constitute a reconciliation of the jury's findings but rather a deconstruction of their consistency.

D. The Actions Below Invaded the Province of the Jury and Deprived Petitioner of His Right to Trial by Jury on His FELA Claim.

The decision below drastically undercut the only damage award made by the jury based on an immaterial answer to a superfluous question. The Supreme Court has held that a failure to respect a jury's FELA award when a view of the case would support it constitutes an invasion of the jury's province and a violation of a FELA plaintiff's Seventh Amendment right to trial by jury. *See, e.g., Gallick*, 372 U.S. 108; *Davis v. Baltimore & Ohio Ry. Co.*, 379 U.S. 671 (1965); *Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *H.T. Arnold v. Panhandle and Santa Fe Ry. Co.*, 353 U.S. 360 (1957).

The flawed analysis of the court below frustrated the jury's obvious intent to award plaintiff $560,000 in net damages. That analysis wrongly assumes that the questions should have been asked, and once asked, produced irrelevant answers. "For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic and Gult Stevedores, Inc.* at 364.

The jury's findings in response to Questions 6-8 were not inconsistent.

VI. CONCLUSION

The decision's approval of a FELA case verdict form asking for apportionment of the plaintiff's "condition" to a "pre-existing condition" following a jury's award of damages is contrary to FELA and the law construing it. The inquiry into an irrelevant answer approved below can only confuse the trial of FELA claims. The decision should be disapproved by this Court. Question 8 did not mention the issue of damages, and the Court's conclusion that 70% of the jury's award was for pre-existing damages was contrary to the record and

constituted prohibited fact finding depriving Petitioner of his right to trial by jury on damages.

WHEREFOR, for the reasons above stated, Petitioner respectfully requests this Court to exercise its sound discretion by granting certiorari review of the decision below in the interests of clarifying Colorado law and substantial justice and permit a full briefing schedule and argument of the important issues presented by this case.

DATED this 7th day of July 2006.

Respectfully submitted,

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(2)

No. 06-1542

Supreme Court, U.S.
FILED
JUL 20 2007
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IN THE

Supreme Court of the United States

CHARLES A. NICHOLS,

Petitioner,

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Charles Nichols has presented compelling reasons to grant the Petition, when the decision of the Colorado Court of Appeals, affirming the district court's entry of judgment in accordance with the jury's answers to *all* of the questions on the verdict form, does not conflict with a decision of this Court, any other federal court or state court, nor implicate a substantial question which has not been settled in the federal courts.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

On January 20, 2005, Respondent Burlington Northern and Santa Fe Railway Company filed a Restated Certificate of Incorporation with the Secretary of State of the State of Delaware officially changing its name to BNSF Railway Company. The parent company of BNSF Railway Company is Burlington Northern Santa Fe Corporation, which owns one hundred percent of the stock of BNSF Railway Company.

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INTRODUCTION

Charles Nichols has presented no compelling reason for this Court to grant his Petition for a Writ of Certiorari (the "Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the opinion of the Colorado Court of Appeals conflicts with a decision of this Court, any other federal court or state court, or that the Court of Appeals decided a question of substance which has not been settled in the federal courts. *See* Sup. Ct. R. 10(a)-(c).

Although Nichols argues that the damages in a case arising under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, may not be reduced in the proportion attributed by the jury to the plaintiff's pre-existing condition, it is settled law in FELA jurisprudence that the railroad is not liable for damages caused by the plaintiff's pre-existing condition. In fact, the jury was instructed regarding the apportionment of damages to a pre-existing condition, and Nichols admits that the jury was properly instructed. (Petition at 7-8). Nor does *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) alter this principle. *Ayers* did not involve the aggravation of a pre-existing condition and its holding cannot be extended to the aggravation of a pre-existing condition. The only other courts to consider this question reached the same conclusion as the court below.

Throughout the Petition Nichols weaves a subliminal argument that the questions on the verdict form were unclear or confusing. Nichols does not present this issue directly for review because he did not preserve it below. Before the verdict form was given to the jury, Nichols did not object to the wording of the questions on it. After the jurors returned their verdict and before they were discharged, he did not

object that their answers were unclear. He therefore failed to preserve any objection to the wording of the verdict form or the clarity of the jury's answers.

"A Petition for Writ of Certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law." Rule 10, Supreme Court Rules. Nichols concedes that the trial court properly instructed the jury regarding the apportionment of damages to a preexisting condition in a FELA case. He argues instead that the trial court misunderstood the jury's answers to questions on the special verdict form when entering judgment. Whether the verdict form is clear; whether Nichols preserved his argument that it is not; and whether the courts below correctly understood the jury's answers are not matters of national import but are matters the Court would need to address if the Petition were granted. The courts below having properly stated the controlling law, this case presents no issue worth review.

STATEMENT OF FACTS

A. Nichols' Pre-Existing Medical Conditions

Charles Nichols has had bipartite patella (a genetic failure of the kneecap to fuse properly) in both knees for over thirty years. (Brucker Dep. at 37:8-18; 38:20-25; 55:2-11). Bipartite patella is painful, and Nichols has had pain his knees. (*Id.* at 40:10-41:13; 43:24-44:3). In fact, he describes this condition as a broken kneecap. (*Id.* at 42:24-43:23; 55:12-56:7; Tr. 9/16 at 65:20-66:1).

Nichols also has degenerative disc disease in his spine, a progressive condition which causes slow but definite

deterioration of the disc spaces over time. (Tr. 9/16 at 32:20-25; 33:21 – 34:3; 45:10-17). Nichols is now over 45 years old, and his lumbar spine or lower back has undergone degenerative changes consistent with someone his age. (Brucker Dep. at 63:1-3; Khan Dep. at 3:5-5:2; 11:12-19; Tr. 9/17 at 48:3-24; 96:22-25). The degenerative changes in Nichols' lumbar spine can cause low back pain, and Nichols had low back pain for many years. (Khan Dep. at 8:24-9:8; Tr. 9/17 at 57:19 – 58:2; 94:17 – 95:2).

Nichols also has a genetic predisposition to develop "Schmorl's nodes" in his spine, a condition which can cause back pain. (Kahn Dep. at 5:24-6:16; 6:5-10; 11:20-12:23; 13:5-9; Tr. 9/17 at 97:1 – 98:4; 98:9-13). Nichols' spine has noticeable Schmorl's nodes. (Tr. 9/17 at 48:10-20; Khan Dep. at 5:24-6:1; 11:20-22; Tr. 9/16 at 18:7 – 10; 34:8-10). Nichols most likely had these Schmorl's nodes "for a long time prior" to 1999. (Tr. 9/16 at 33:4-7; 34:14-18).

Nichols also has osteophyte formations in his spine, a condition which again is related to the aging process. (Khan Dep. at 7:9-8:4; Tr. 9/16 at 34:19-23). Nichols most likely had these osteophytes before 1999. (Tr. 9/16 at 19:20 – 35:3). Degenerative disk disease, Schmorl's nodes and osteophyte formations can all cause lower back pain. (Khan Dep. at 8:24-9:8).

B. The Accident and Lawsuit

On November 7, 1999, as Nichols was climbing aboard a locomotive, he felt a severe tingling sensation in his right hand, as though it were asleep. (Tr. 9/16 at 93:14-23; 95:5 – 96:3; 96:19-97:6). He then lost his grip and fell, injuring his right knee. (*Id.* at 96:15 – 98:3; 100:9 – 101:1). After the

accident, Nichols was treated by Dr. Wallace Brucker for his knee injury. (*Id.* at 109:5-7; Brucker Dep. at 8:16-10:6). Nichols continues to have pain in his knee and lower back. (Tr. 9/16 at 15:21 – 16:6; 110:17-22).

Nichols filed suit in Colorado state court against the Burlington Northern Railway Company ("BNSF") under FELA, asserting two claims. (*See* Pld. 1 at pp.1-5). The first claim was for the "neck strain and injury" allegedly caused by repeated trauma in Nichols' work as an engineer. The second claim was for the injury to his right knee and lower back caused by his fall from the locomotive. (*Id.* at p.2). Nichols alleged that BNSF assigned him to work which was likely to "aggravate any pre-existing condition which may have been present in [his] body." (*Id.* at p.3, ¶¶ IV(e) and (k); *see also* p.4, ¶ VI). As an affirmative defense, BNSF alleged that "Plaintiff's injuries or conditions pre-existed the incidents alleged in his Complaint." (*Id.* at p.7, sixth affirmative defense). After the parties settled Nichols' claims for injury to his neck and arms, only the claim for injury to his right knee and lower back remained. (Pld. 3 at p.577, ¶¶ 2, 3).

At the conclusion of trial, the court found sufficient evidence to support an instruction on aggravation of pre-existing conditions, and Nichols agreed. (Tr. 9/18 at 16:18-24). After deliberating for almost four hours, the jury found that both BNSF and Nichols were negligent; that Nichols' negligence caused thirty percent of his claimed injuries; that $800,000 would fairly compensate Nichols for his claimed injuries; and that seventy percent was attributable to his pre-existing conditions. (Pld. 6 at pp.1391-1392; Tr. 9/18 at 112:8 – 113:9). The judge read the verdict aloud, polled the jury, accepted the verdict pursuant to Rule 47, C.R.C.P., discharged

the jury, and gave the parties one day to file briefs concerning the judgment to be entered. (Tr. 9/18 at 113:14 –117:25; 120:9-121:6).

In his brief regarding entry of judgment, Nichols asserted (for the first time) that Question 7 on the verdict form was ambiguous and should have been explained to the jury. (Pld. 5 at pp.1336-1339). Nichols further asserted that the jury's responses were only "informative" and not intended to provide the basis for judgment. (*Id.* at p.1339). The trial court rejected these arguments and entered judgment against BNSF for almost $165,000 in accordance with the jury's answers to *all* of the questions on the verdict form. (Pet. App. at 1a). The Colorado Court of Appeals affirmed the judgment, and the Colorado Supreme Court declined review. (Pet. App. at 7a and 20a). Since then, BNSF has paid the full amount of the judgment, plus interest, into the registry of the trial court, where Nichols may access it at any time, and the trial court has entered an order directing satisfaction of the judgment.

REASONS FOR DENYING THE PETITION

I. FELA ALLOWS THE APPORTIONMENT OF DAMAGES TO A PRE-EXISTING CONDITION.

FELA is "founded on common law concepts of negligence and injury, subject to such qualifications as Congress" has declared. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). "*Only* to the extent of these *explicit statutory alterations* is FELA 'an avowed departure from the rules of the common law'." *Id.* at 544. Nothing in FELA alters the common law principle regarding the apportionment of damages to a pre-existing condition, and it is well established that this principle is followed in FELA cases.

Stevens v. Bangor and Aroostook Railroad Co., 97 F.3d 594, 598 (1st Cir. 1996); *Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490, 1493-1495 (10th Cir. 1996).

A federal pattern jury instruction designed for use in FELA cases states this principle. 3A O'Malley, Grenig & Lee, *Federal Practice and Jury Instructions – Civil* (5th Ed. 2001) at § 155.65 (hereafter "*O'Malley*"). The jury here was given this instruction (Pet. App. at 52a, Instruction No. 28; Pld. 3 at p.1371; Tr. 9/18 at 70:20-71:17), and Nichols agrees that the jury was properly instructed. (Petition at 7-8). The Colorado Court of Appeals therefore properly rejected the assertion that FELA does not allow the apportionment of damages to a pre-existing condition. (Pet. App. at 10a-12a).

II. *AYERS* DOES NOT ALTER THIS PRINCIPLE.

Nichols argues *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) supports his conclusion that FELA does not allow the apportionment of damages to a pre-existing condition. (Petition at 18-19). Again, the Court of Appeals properly rejected this argument as wrong as a matter of law. (Pet. App. at 12a).

Ayers did not involve a claim for damages caused by the aggravation of a pre-existing condition. Rather, the issue in *Ayers* was whether a railroad is responsible for the full amount of harm caused by the combined negligence of the railroad and other entities. 538 U.S. at 140. This Court concluded that the railroad should be liable for the full amount of harm, resting this conclusion principally on two grounds: the history of "consistent judicial applications of the Act"; and the ability of the railroad to recover from third parties the proportion of damage they caused. *Id.* at 162-

165. A review of these factors here leads to the conclusion that *Ayers* does not alter the common law principle regarding the apportionment of damages based on the aggravation of a pre-existing condition, as three courts across the country (including the court below) have found.

First, in *Ayers* this Court found "significant" the "paucity of lower court authority for the proposition that FELA contemplates apportionment" to third parties. *Id.* at 162. In contrast here, the apportionment of damages to a pre-existing condition in FELA is well established. Recognizing that FELA departs from the common law "*only* to the extent of [the] explicit statutory alterations" contained in it, and further recognizing that nothing in FELA explicitly alters the common law principle regarding the apportionment of damages to a pre-existing condition, this principle survived the enactment of FELA.

Second, this Court in *Ayers* repeatedly emphasized that a railroad held liable for the full amount of harm caused by itself and third parties could recover the proportion of damages it did not cause through an action for contribution or indemnity. 538 U.S. at 162-165. That avenue of relief is not available when the harm is in part the result of a pre-existing condition, as the court noted in *Meyer v. Union Pacific Railroad Co.*, 865 A.2d 857 (Pa. Super. Ct. 2004).

In *Meyer*, the Pennsylvania Superior Court held that the trial court in a FELA case must instruct the jury regarding the apportionment of damages to a pre-existing condition and explained that *Ayers* has no relevance to this issue:

> Madame Justice Ginsberg's learned opinion [in *Ayers*] did not address whether a plaintiff's

> pre-existing condition was apportionable under FELA, the controlling issue in the instant case, nor did she discuss other federal cases dealing with this issue. *E.g. Sauer* . . . * * * . . . the issue before the *Ayers* Court related to a third-party's concurrent negligence rather than a plaintiff – employee's pre-existing condition.
>
> * * *
>
> Moreover, since the *Ayers* Court continued to recognize an employer's right to seek contribution or indemnification from concurrently liable third parties, *Ayers* does not naturally extend to cases involving pre-existing conditions. If we were to extend *Ayers* to these cases, employers would lack any recourse to recoup losses incurred by satisfying damage awards for injuries that were caused solely by a pre-existing condition.

Id. at 865-866. The decision in *Meyers* demonstrates that *Sauer*, and not *Ayers*, answers the question of how to apportion damages to a pre-existing condition in a FELA case, as the Court of Appeals here properly found. (Pet. App. at 12a).

The Court of Appeals' decision is consistent with both *Meyers* and *Rust v. Burlington Northern and Santa Fe Railway Co.*, 308 F. Supp.2d 1230 (D. Colo. 2003), the only two other reported cases in the country addressing the application of *Ayers* to a claim for aggravation of a pre-existing condition. In *Rust*, the defendant believed that plaintiff's injuries were caused in part by a "pre-existing degenerative medical condition." 308 F. Supp.2d at 1230.

Plaintiff filed a motion in limine to exclude evidence of this condition, arguing that it was inadmissible under *Ayers*. The district court rejected this argument, finding that "*Ayers* is by no means dispositive." 308 F. Supp.2d at 1231.

Nichols' assertion that the decision below conflicts with cases from various other states does not withstand analysis. For example, Nichols asserts that the Alabama Supreme Court in *Norfolk Southern Railway Co. v. Bradley*, 772 So.2d 1147 (Ala. 2000) advised against instructing the jury in FELA cases regarding the apportionment of damages to a pre-existing condition because to do so would confuse the jury. (Petition at 22). To the contrary, *Bradley* affirmed the trial court's rejection of the defendant's tendered instruction because *it* was confusing and misleading. 772 So.2d at 1152.

Nichols' reliance on *Worthy v. Norfolk and Western Railway Co.*, 619 N.E.2d 1371 (Ill. App. 1993) is equally misplaced. The Illinois Court of Appeals in *Worthy* rejected the railroad's tendered jury instructions on apportionment of damages to a preexisting condition, concluding that the Illinois pattern instruction sufficiently addressed the issue. 619 N.E.2d at 1374-1376. Nine years later, the Illinois Supreme Court in *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 775 N.E.2d 964 (Ill. 2002) soundly criticized *Worthy*, explaining that the Illinois pattern instruction was misleading and did not follow FELA law. 775 N.E.2d at 974-977.

Nor does *Hager v. Norfolk & Western Railway Co.*, 2006 WL 3634373 (Ohio App. 2006) support Nichols' argument. The holding in *Hager* was based in large part on the order in which the apportionment questions were submitted to the jury. 2006 WL 3634373 at *8. Nichols here failed to object to the order in which the questions were submitted to the jury, as the Colorado Court of Appeals noted. (Pet. App. at 12a).

III. NICHOLS MAY NOT NOW CHALLENGE THE WORDING OF THE VERDICT FORM.

Throughout the Petition, Nichols insinuates that the verdict form is confusing. (Petition at i, 9, 16, 23 n.8). The wording of the verdict form used in this case is not a matter of national importance. As the Court of Appeals noted, the verdict form is not to be used as a model in future cases. (Pet. App. at 14a). Nichols' shadow argument also comes too late.

Under Colorado law, parties "shall make *all* objections" to the instructions before they are given to the jury, and "*only* the grounds so specified shall be considered on motion for a new trial or on appeal . . ." Rule 51, C.R.C.P., emphasis added; *Ross v. Colorado National Bank*, 170 Colo. 436, 463 P.2d 882, 885 (1969). Objections to the instructions must be both contemporaneous and specific. *Mallett v. Pirkey*, 171 Colo. 271, 466 P.2d 466, 473-474 (1970). The same rules apply to verdict forms. *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1329-1330 (Colo. 1997). Federal law is similar. Rule 51(c)(1), F.R.C.P. ("A party who objects to an instruction . . . must do so on the record, stating distinctly the matter objected to and the grounds of the objection"); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 189 (1st Cir. 1996), *cert. denied* 519 U.S. 927 (1996) (". . . the grounds for objection must be stated 'distinctly' after the charge to give the judge an opportunity to correct his . . . error") (hereafter "*Coastal Fuels*").

These principles bar consideration of Nichols' arguments concerning the language of the verdict form. Nichols objected to the use of "Special Verdict Form B" primarily (indeed, almost exclusively) on the erroneous ground that FELA does

not allow the apportionment of damages to a pre-existing condition. (Pet. App. at 28a; Tr. 9/18 at 42:17-43:7). Nichols did *not* object to the verdict form, *before* the jury was instructed, on the grounds that Questions 7 and 8 were poorly worded or confusing.

Further, a party may not argue on appeal that the jury's responses to interrogatories are inconsistent unless that argument was made in the trial court *before the jury was discharged. Masure v. Donnelly*, 962 F.2d 128, 135 (1st Cir. 1992); *Lewis v. Cowen*, 979 F. Supp. 99, 105-106 (D. Conn. 1997), *rev'd on other grounds* at 165 F.3d 154 (2d Cir. 1999); *Grant v. Westinghouse Electric Corp.*, 877 F. Supp. 806, 813-814 (E.D.N.Y. 1995). Failure to make a timely objection deprives the trial court of the most efficient means of resolving the problem: simply asking the jury to explain their answers. *Haskell v. Kaman Corp.*, 743 F.2d 113, 123 (2d Cir. 1984); *Blissett v. Eisensmidt*, 940 F. Supp. 449, 454 (N.D.N.Y. 1996).

The same rule applies to claims that the jury's answers are redundant, duplicative or ambiguous. *Greenway v. Buffalo Hilton Hotel*, 951 F. Supp. 1039, 1065-1066 (W.D.N.Y. 1997), *aff'd at* 143 F.3d 47 (2nd Cir. 1998); *Bseirani v. Mahshie*, 881 F. Supp. 778, 784-785 (N.D.N.Y. 1995), *aff'd at* 107 F.3d 2 (2nd Cir. 1997); *United States Football League v. National Football League*, 842 F.2d 1335, 1367 (2d Cir. 1988); *Coastal Fuels* at 201-202. Thus, Nichols waived his argument that the jury's answers to questions on the verdict form are "superfluous" or "immaterial." (*See* Petition at 17, 20).

Nichols here did not object to the jury's answers on the special verdict form until *after* the jury had been discharged.

His failure to make a timely objection deprived the trial court of the most efficient means of resolving the problem which Nichols now asserts. As a result, Nichols "has constructed his [appellate] argument to traverse a narrow path," as noted by the Court of Appeals. (Pet. App. at 10a). The Petition's constitutional rumblings notwithstanding, that "narrow path" never touched the Seventh Amendment.

Nichols *never* argued in the trial court or the Court of Appeals that the questions on the verdict form, or the court's enforcement of the jury's answers to those questions, deprived him of a jury trial in violation of the Seventh Amendment. In fact, Nichols never even *mentioned* the Seventh Amendment until seeking review in the Colorado Supreme Court. Not surprisingly, that court declined the invitation to consider a constitutional issue which had not been raised below. This Court follows the same wise practice. *Ellis v. Dixon*, 349 U.S. 458, 459, 460, 464 (1955); *International Brotherhood of Teamsters v. Denver Milk Producers*, 334 U.S. 809 (1948).

The only argument which Nichols did preserve is his generic assertion that no question regarding the apportionment of damages to a pre-existing condition should have been submitted to the jury. (Pet. App. at 28a). As noted, however, the railroad in a FELA case is not liable for damages caused by a pre-existing condition. Further, under both Colorado and Federal law, the district court has wide discretion to decide whether to use special verdict forms. Rule 49, F.R.C.P.; Rule 49, F.R.C.P.; *TransAmerica Premier Insurance Co. v. Ober*, 107 F.3d 925, 933 (1st Cir. 1997); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 191 (4th Cir. 1994) (hereafter "*Bristol Steel*"). The value of using special verdict forms is well recognized. *Ayers* at 159; *O'Malley* at § 8:3, pp. 836-837.

Moreover, *asking* the jury a question regarding the apportionment of damages to a pre-existing condition could cause Nichols no harm so long as the jury's intent is reflected in the judgment. No purpose would be served by issuing a writ to review a discretionary decision which was at most harmless error. *See* Rule 61, F.R.C.P.; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("... it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61"); 28 U.S.C § 2111.

The crux of Nichols' argument is his assertion that the district court misinterpreted the jury's intent when entering judgment. This argument in turn rests upon Nichols' unfounded belief that the jury intended nothing by their response to Question 8. Notwithstanding his submission of this argument to *eleven judges* (the judge of the District Court for the City and County of Denver who presided over the trial; the three judges on the panel of the Colorado Court of Appeals who issued the decision under review; and the seven justices of the Colorado Supreme Court who denied Nichols' petition for writ of certiorari), *not one* has accepted it. Both the trial court and the Court of Appeals found that the judgment reflects the jury's intent, and the Colorado Supreme Court saw no reason to disagree with this conclusion.

IV. BOTH THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY GAVE EFFECT TO *ALL* OF THE ANSWERS ON THE VERDICT FORM.

Nichols' assertion that the courts below failed to reconcile the jury's answers to the questions asked on the special verdict form is flatly contradicted by the record. The trial court reviewed the jury's answers to *all* of the questions

submitted and rejected Nichols' argument, finding that "To apply the construction proffered by Plaintiff necessarily ignores the jury's complete findings in this case, namely that plaintiff was contributorily negligent *and* that his injuries complained of were primarily pre-existing the date of the accident." (Pet. App. at 2a, emphasis in original). The Court of Appeals first correctly observed that "On appeal, we must attempt to reconcile a jury's answers to special verdict questions if we can do so based on the evidence and the instructions given." (Pet. App. at 15a). Then, after reviewing *all* of the jury's answers, the Court of Appeals rejected Nichols' argument "that the jury may have arrived at the $800,000 figure after determining the extent to which his losses were caused only by the aggravation of his pre-existing condition." (*Id.* at 16a). Both courts applied the correct standard and followed the correct procedure; they simply disagreed with Nichols' argument.

Nichols argues that the jury's responses to Questions 7 and 8 are "immaterial" or "necessarily subsumed" within their answer to Question 6. (Petition at 17). From this premise, Nichols concludes that both the trial court and the Court of Appeals erred in giving force to these "immaterial" answers to "superfluous question[s]" which "merely sought clarification of the jury's thought process." (*Id.* at 17, 20 n.7). This argument should be rejected for several reasons.

First, under Colorado law, a verdict should be construed, if at all possible, in such manner as to make it *effective* rather than *void*. *Boynton v. Fox Denver Theaters*, 121 Colo. 227, 214 P.2d 793, 795 (1950); *Tyler v. District Court*, 613 P.2d 899, 901 (Colo. 1980). Similarly, under federal law, the court should strive to *harmonize*, rather than *nullify*, the jury's answers to questions submitted. *Jewell v. Holzer Hospital*

Foundation, 899 F.2d 1507, 1510 (6th Cir. 1990); *Theurer v. Holland Furnace Co.*, 124 F.2d 494, 498 (10th Cir. 1991). Nichols' interpretation of the verdict form, which renders the answers to Questions 7 and 8 "superfluous" and "immaterial," violates these fundamental rules.

Second, Nichols' argument disregards the court's duty when confronted with allegedly inconsistent verdicts. As the court below recognized, an appellate court must reconcile the jury's answers to special verdicts, if possible. (Pet. App. at 15a). Special verdicts will not be set aside as inconsistent if the record discloses any evidentiary basis to support them. *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo. 1981); *Alzado v. Blinder, Robinson & Co.*, 752 P.2d 544, 554 (Colo. 1988). The court must examine the record and determine whether competent evidence supports the verdicts. *Loveless* at 1063. Federal courts follow the same procedure. *Bristol Steel* at 190 ("The answers to special verdicts should be reconciled under any rational theory consistent with the evidence, and equally the answers should be harmonized if possible"); *Jewell* at 1510 (". . . federal law favors upholding the verdict if there exists some legal basis, supported by the evidence, upon which the verdict could be based"); *Theurer* at 498 (court should strive to reconcile special verdicts "on any reasonable theory consistent with the evidence and its fair inferences"); *Grant* at 810 (". . . the Court should approach the record with the goal of trying to harmonize what is claimed to be an inconsistent verdict. * * * That inquiry must be made within the context of both the factual record and the Court's charge").

Under these principles, Nichols' argument that the jury's responses to Questions 7 and 8 are "superfluous" or "immaterial" must be rejected. The record contains competent

evidence from which the jury could determine that the major portion of Nichols' claimed damages were attributable to pre-existing conditions in his knees and lower back. Long before the accident, Nichols had bipartite patella in his knees, and degenerative disk disease, Schorl's nodes and osteophyte formation in his spine and lower back. Contrary to Nichols' assertion that these conditions were "latent" and "asymptomatic," these conditions were progressive, noticeable and painful *before* the accident. (Petition at 1, 7; *see* Section A *under* Statement of Facts *supra*).

Further, at trial, Dr. Brucker could say only that the damage to Nichols' knee was caused "at least in part" by the accident. (Brucker Dep. at 24:15-25:7; 36:3-6). Similarly, Dr. Kenneth Danylchuk, another of Nichols' treating physicians, was unable to say whether Nichols' low back pain was caused by the accident or by the degenerative changes and Schmorl's nodes in his back. (Tr. 9/16 at 18:13 – 19:15). Asked whether the medical treatments for Nichols' lower back were made necessary by the accident, Dr. Danylchuk could only say the treatments were "at least in part directly related to" the accident. (*Id.* at 31:21 – 32:24). The tepid comments by these doctors that the damage to Nichols' knee and medical treatments for his lower back were caused by, or related to, the accident "*at least in part*" support the countervailing inference that these items of damage were *primarily* caused by, or related to, the pre-existing conditions in his knees and lower back.

Starting with the erroneous premise that the jury intended nothing by their responses to Questions 7 and 8, Nichols asserts that their answer to Question 6 is the only finding regarding damages. (Petition at 8). But that is the wrong starting point. The court must first determine if the jury's

responses to the questions on the verdict form are supported by the evidence. *Loveless* at 1063; *Alzado* at 554; *Bristol Steel* at 190; *Jewell* at 1510; *Theurer* at 498; *Grant* at 810. Because the jury's answers to *all* of the questions on the verdict form are supported by the evidence, the Court of Appeals correctly affirmed the trial court's entry of judgment in accordance with *all* of these answers.

Nichols' reliance on *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), is misplaced. The trial court in *Gallick* entered judgment for the employee on the jury's special verdict; the Ohio Court of Appeals then set aside the judgment and verdict as contrary to the evidence. *Id.* at 108, 112-113. This Court reversed the ruling of the Ohio Court of Appeals and reinstated the original judgment because the jury's special verdict was supported by the evidence. *Id.* at 113-114 ("We hold that the record shows sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of respondent. * * * Under the ruling cases in this Court the evidence presented was sufficient to raise an issue for the jury's determination . . ."). In the present case, the trial court entered judgment on the basis of the jury's special verdict, and the Court of Appeals *affirmed* that judgment because the verdict *is supported* by the evidence. Unlike the situation in *Gallick*, Nichols would have this Court set aside the judgment entered by the trial court and affirmed by the Court of Appeals on the unspoken grounds that it is not supported by the evidence.

V. NICHOLS' VARIOUS ARGUMENTS OVERLOOK THE INSTRUCTIONS AND/OR THE EVIDENCE.

Nichols argues that the jury excluded damages attributable to pre-existing conditions when awarding him $800,000, because Instruction No. 28 directed the jury "to determine, if possible, the amount of damages . . . caused only the negligence of the Defendant" and explained that Nichols "is entitled to recover damages caused only by the negligence of the Defendant." (Petition at 1; Pet. App. at 52a; Pld. 5 at p.1371; Tr. 9/18 at 70:20 – 71:17). This argument overlooks the basic principle that, under both Colorado and federal law, the instructions and verdict forms should be read as a whole. *Montgomery Ward & Co. v. Kerns*, 172 Colo. 59, 470 P.2d 34, 36-37 (1970); *Putnam Resources v. Pateman*, 958 F.2d 448, 455 (1st Cir. 1992) (". . . it is well established that verdicts must be construed in light of the totality of the circumstances, including the court's instructions"); *Halprin v. Mora*, 231 F.2d 197, 201 (3rd Cir. 1956); *McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 59 (5th Cir. 1961).

Consistent with the language of FELA, the trial court instructed the jury that Nichols must prove that BNSF was negligent and that such negligence "was a 'legal cause' of damage sustained by the Plaintiff." (Pet. App. at 41a-45a; Pld. 5 at p. 1356; Tr. 9/18 at 62:21 – 63:11). The court also gave the jury the following explanation of "legal cause":

> For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from evidence in the case that any negligence of the

> Defendant contributed in any way toward any injury or damages suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's act or omission.
>
> Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

(Pet. App. at 42a-43a; Instruction No. 8; Pld.5 at p. 1351; Tr. 9/18 at 59:16 – 60:4). Reading Instructions 8, 13 and 28 together, the jury was instructed to determine the amount of damages caused by the negligence of BNSF; that negligence is a cause of damages under FELA if it is a "legal cause"; and that BNSF's negligence is a legal cause of damages if such negligence "operate[d] in combination with . . . some natural cause" and "played any part, no matter how small, in causing such damage."

Applying these instructions to the facts of this case, BNSF's negligence was a legal cause of damages if such negligence operated in combination with Nichols' pre-existing conditions in causing the claimed damages, and that negligence played any part, no matter how small, in causing those damages. Thus, the damages found by the jury could include amounts attributable to Nichols' pre-existing conditions, so long as BNSF's negligence operated in combination with those conditions to produce the total damages.

Nichols argues that the jury's response to Question 6 does not include any damages attributable to a pre-existing condition, because the jury was instructed to award damages only for injuries caused by the accident. (Petition at 1). This argument overlooks the fact that the phrase "the injury" in Question 6 is given meaning by Question 2, which refers to the "injuries, damages and losses *claimed* by the Plaintiff", and by Question 4, which refers to "his own *claimed* injuries". (Pet. App. at 4a-5a; emphasis added). Read in context, Question 6 therefore asks the jury to determine what amount would fairly and adequately compensate Nichols for the injuries he *claimed.*

Nichols *claimed* that his right knee and lower back hurt; that he would need surgery in his right knee; and that because of these problems he could no longer work as an engineer. The amount determined by the jury which would fairly compensate Nichols for the injuries he claimed therefore includes damages for the problems in his knees and lower back, problems which were in large part attributable to pre-existing conditions.

As the Court of Appeals noted, if the $800,000 award did not include damages attributable to Nichols' pre-existing conditions, then the jury must have found that Nichols' total damages exceeded $2.5 million. (Pet. App. at 16a). As the court further observed, however, the evidence could not support a damage award exceeding $1 million. (*Id.*). Nichols asserts that because his pre-existing conditions were latent and asymptomatic, the jury could not have included any damages for those pre-existing conditions in their answer to Question 6. (Petition at 1; Pet. App. at 67a). This assertion ignores the evidence regarding the patent, progressive and painful nature of Nichols' pre-existing conditions.

CONCLUSION

For the reasons stated above, BNSF respectfully requests that the Court deny Nichols' Petition for a Writ of Certiorari.

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IN THE

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CHARLES A. NICHOLS,
Petitioner,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Colorado Court of Appeals

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REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

BNSF avoids Nichols' argument by characterizing it as something it is not. Section I of Respondent's brief, for example, raises a non-issue. Nichols has never argued that a FELA jury cannot separate damages caused by a pre-existing condition in determining its award to a plaintiff. The common law of FELA permits such separation and, if separation can be made, forbids inclusion of any damages caused by a pre-existing condition in damages awarded against the railroad. Likewise, Respondent's discussion of *Ayers*[1] in Section II of its brief treats a non-issue. Nichols has never argued that *Ayers* precludes separation of damages caused by a pre-

[1] *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135 (2003).

existing condition from those caused by the railroad's negligence. Petitioner relies on *Ayers* for the analytical framework it provides in addressing a FELA damage issue in light of the Act's "recovery facilitating thrust." *Ayers*, 538 U.S. at 161.

Respondent devotes but one paragraph each to *Gallick*[2] and the three state cases[3] that run contrary to Respondent's argument here. It dismisses these authorities merely by conclusorily declaring them inapposite. Contrary to Respondent's arguments, the fact that the jury was properly instructed that it could not award damages caused by a pre-existing condition is a compelling reason to grant review, not evidence that the courts below merely made a mistake in applying established law. As instructed, the jury had already reduced its damage award for any pre-existing conditions before assessing Nichols' total damages in answer to Question 6.

Nichols' preservation of error in these regards is clearly documented in the record, including at Appendices F at 28a, D, G, J, K & L. At the time BNSF tendered the verdict form used by the trial court, Nichols objected on the basis that FELA and the law interpreting it permitted but one and only one reduction of a FELA damage award—the degree of comparative negligence found by the jury.

ARGUMENT

I. Nichols Has Never Argued That FELA or *Ayers* Forbids Separation of Damages Caused by Pre-existing Conditions.

BNSF persists in characterizing Nichols' argument as advocating that apportionment for pre-existing conditions under FELA is impermissible and equates post-verdict reduction of damages by the trial court with apportionment for pre-existing conditions in determining damages by the jury, *see*,

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[2] *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963).

[3] *Hager*, *Bradley*, and *Worthy*, *supra* at 3-5.

e.g., Opposition Brief at 6, 10-11, to prove a point immaterial to the issue at hand.

Nichols simply argues that the trial instructions properly directed the jury not to award damages attributable to pre-existing conditions and that it must be presumed that the jury followed these instructions in answering Interrogatory 6. *See* Appendix H at 41a-55a (Insts. Nos. 5, 24, 26, 28, 32 & 33).[4] Hence it must be concluded that the jury did not include any damages for any pre-existing conditions in reaching its award.

Under *Gallick*, 372 U.S. 108, reinforced by this Court's decision in *Ayers*, 538 U.S. 135, the unavoidable conclusion is that the *trial court* could not further reduce the jury's award of damages by the pre-existing condition apportionment of Nichols' "condition" after the jury had already excluded from its damage award in answer to Question 6 any amount attributable to a pre-existing condition. The question of pre-existing conditions goes only to the calculation of damages by the *jury* and may not be used by the trial court as a basis for a further reduction of the jury's damage award.

The verdict form supports this interpretation. The only damage calculation made by the jury was the $800,000. This amount represented "the full amount of all damages sustained by the plaintiff, as a proximate result of the accident," Appendix H at 50a (Inst. No. 24), and thus "the amount that would fully compensate Plaintiff for his injury." Appendix A at 5a (Question 6). The answers to Questions 7 and 8 provide no basis for determining damages because the instructions directed that the jury could only award damages caused by the railroad's negligence. Question 6 specifically instructs the

---

[4] Instruction No. 24 directed the jury that, before comparing the negligence of the parties, it must "*first*, determine the full amount of all damages sustained by the plaintiff, as a proximate result of the accident . . . ." Appendix H at 50a. There is no reference to inclusion of damages sustained as a result of pre-existing conditions.

jury to answer the question "without any reduction for any negligence which you may find on the Plaintiff's part . . . ." It does not, however, direct the jury to answer Question 6 without any reduction for *pre-existing conditions*. The plain terms of Question 6, when read along with the jury instructions, request a dollar amount that would fairly compensate the Plaintiff for his injury proximately caused by defendant's negligence, without any reduction for comparative negligence, but *with* a reduction for damages attributable to a pre-existing condition as the instructions directed.

Moreover, while the instructions informed the jury that any finding of comparative negligence would reduce damages awarded, Appendix H at 49a-50a, Inst. 23, the jury was never informed, in either the instructions or in the verdict form questions, that the answers to Questions 7 and 8 could result in a further reduction.[5] Absent any reference to "injury," "damages," or to "Question 6" in either Questions 7 or 8, it must be presumed that the jury did not consider the answers to those questions as possibly having that effect.

II. BNSF's Discussion of Nichols' Medical History is Irrelevant and Attempts to Argue an Impermissible Point.

BNSF presented *no* medical evidence in this case that, absent the injuries caused by the work accident, Nichols would have inevitably suffered the same permanent and total disability from working as a railroad engineer. Nichols had experienced *no* symptoms relating to his back or right knee prior to the accident, for which he was compensated by the jury. Tr.3 at 65:5-19. Not until treatment for the injuries he sustained in the fall was it discovered that Nichols had a congenital knee problem, Tr.3 at 65:20-24; Tr.3 at 16:22-

[5] Compare Questions 9 and 10 on the issue of mitigation. Appendix A at 6a. These questions refer explicitly to the "damages" found in response to Question 6.

17:2, and a mild degenerative condition in his spine. Tr.3 at 18:7-12. The damages awarded at trial were caused by BNSF's negligence in returning Nichols to work, without restrictions, knowing of his hand and wrist weaknesses that made him more vulnerable to on-the-job injury.

BNSF's one-sided recitation of Nichols' medical history implies that a second 70% reduction in the jury's damage award was warranted and is merely an attempt to argue indirectly that the underlying evidence does not support the $800,000 jury award—an argument neither supported by the evidence nor preserved by BNSF. BNSF did not appeal the award on the basis that it was against the great weight of the evidence and should not now be permitted to recast Nichols' medical history to back-door this argument.

III. Nichols Indisputably Preserved His Objection to the Verdict Form For Appeal.

The court of appeals held that Nichols preserved his right to appeal the propriety of the verdict form and the court's second reduction of damages. Appendix B at 11a-12a. The court's conclusion that Nichols failed to preserve his right to object to "the order" of the questions, *id.* at 12a, ignored authorities holding that a party is not required to object to inconsistencies in a *special verdict* before the jury is discharged in order to preserve the right to challenge the inconsistencies in a subsequent motion or on appeal. *See, e.g., Thompson v. State Farm Fire & Cas. Co.*, 34 F 3d 932, 944 (10th Cir. 1994); *Bonin v. Tour W., Inc.*, 896 F.2d 1260, 1263 (10th Cir.1990); *Morales v. Golston*, 141 P.3d 901, 905 (Colo. App. 2005), *citing Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847 (10th Cir. 2000).

BNSF's bald statement that Nichols merely objected to its form on the basis that FELA does not allow for apportionment of pre-existing conditions is incorrect. Opposition Brief at 10-11. Rather, Nichols objected to the inclusion in the form

of any special interrogatories concerning pre-existing conditions and to the wording of the form on the ground that, while the jury may account for pre-existing conditions in reaching the general damages verdict in a FELA case, asking for a percentage allocation of such conditions in a special interrogatory and the court's reduction of a general verdict based on the jury's response would be error. Appendix F at 28a. Further, Nichols tendered his own, correctly worded proposed verdict form, which the trial court rejected. *See* Appendix F at 28a. This is more than sufficient to preserve all of the objections now voiced by Nichols. Further, the federal character of these issues was raised in the trial court, the Court of Appeals, and the Colorado Supreme Court. *See* Appendix D, F, G, J, K, & L.

IV. BNSF Fails to Respond With Any Analysis of *Gallick* Nor Any Meaningful Distinctions of the State Court Cases, But Merely Declares Them Inapplicable.

BNSF fails to address Nichols' extensive discussion of *Gallick* and the state cases, *Bradley*, *Hager*, and *Worthy*, which reject Respondent's argument here. Petition at 12-18. BNSF devotes only one paragraph to *Gallick*, Opposition Brief at 17, and less than one page to the state court cases. *Id.* at 9. Without analysis, BNSF simply declares all four cases to be distinguishable. Contrary to BNSF's insubstantial attempt to distance them from the facts of this case, these authorities squarely address the same issues raised on appeal and conclude that the use of such pre-existing condition interrogatories is improper, and further, even if utilized in the trial of a FELA case, the subsequent reduction of an award based upon the jury's answers to those questions would be error.

In *Hager v. Norfolk & Western R. Co.*, 2006 WL 3634373 (Ohio 2006), the Ohio Supreme Court properly reconciled the jury's award of damages with its answers to pre-existing condition questions in a FELA case to uphold the damage

award rather than reduce it. The court concluded that "reading the interrogatories in conjunction with the trial court's instructions, it appears the jury deducted the 60 percent from the verdict. It is presumed the jury followed the trial court's instructions." *Id.* at *8. This is precisely the position that Nichols urges here. *See also Gallick*, 372 U.S. 108.

Also directly on point is *Norfolk So. Ry. Co., Inc. v. Bradley*, 772 So.2d 1147 (Ala. 2000), involving a railroad engineer who suffered injuries when the train he was operating struck another train after he was instructed to switch tracks. The engineer sued, alleging that the railroad was negligent by failing to determine whether the engineer's track was clear. The trial court entered judgment on the jury's $700,000 verdict and denied the railroad's motion for a new trial, judgment n.o.v., or remittitur.

The railroad urged on appeal that the trial court's refusal to submit a special verdict form to the jury asking for apportionment of damages between the accident and pre-existing and unrelated illnesses was error. In denying the motion for a new trial, the trial court observed that the proposed verdict form, including questions nearly identical to those at issue here,[6] was "unduly confusing and would have been susceptible to misinterpretation." *Id.* at 1152.

The Alabama Supreme Court upheld the trial court's rejection of the proposed verdict form, reasoning as follows:

> The questions are inconsistent and present an incorrect basis for determining damages. The questions would have asked the jury to determine the amount of damages Bradley was entitled to based on the on-the-job accident

[6] Question 6 in *Bradley* asked: "What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury he received?" *Id.* Question 7 asked: "What percentage of the damages determined in Question No. 6 above is attributable to a pre-existing condition or to the Plaintiff's previous or subsequent accidents?" *Id.*

> and then to assign a percentage of those damages as being attributable to another accident or medical condition.

Id. The court also observed that "the trial court specifically charged the jury that Bradley could not recover for any other accident or illness that was not directly the result of the accident in question." *Id.*

Here, the jury was also properly instructed, but was erroneously asked the near-identical (but even more confusing) questions regarding pre-existing conditions rejected by the *Bradley* court.[7] Just as in *Bradley,* the verdict form here was also confusing, misleading, inconsistent, and presented an incorrect basis for determining damages. Like in *Bradley,* as instructed, the jury would already have taken into account the effect of any pre-existing conditions when it calculated damages at $800,000. Thus, the answers to Questions 7 and 8 should have been disregarded as surplusage.

Worthy v. Norfolk So. Ry. Co., 619 N.E.2d 1371, 1375-76 (Ill. App. 1993), also provides helpful guidance. *Worthy* approved the trial court's rejection of interrogatories calling for a percentage apportionment of damages to pre-existing conditions because, in reality, the questions related not to the issue of aggravation, but to the reduction of damages. Because reduction of damages was not an issue of ultimate fact upon which the rights of the parties depended in the case, the appellate court concluded that such interrogatories were improper for submission to the jury in the trial of a FELA action.

Such is precisely the case here. It must be presumed that the jury followed the instructions given and thus did not include any amount for a pre-existing condition in its award of

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[7] BNSF dismisses *Bradley* on the basis that it "affirmed the trial court's rejection of the defendant's tendered instruction because *it* was confusing and misleading." Opposition Brief at 9. Nichols submits that such confusion would ensue in almost every FELA case where these types of interrogatories are submitted to the jury.

$800,000, a result fully supported by the evidence of record. Thus the answers to Questions 7 and 8 go not to aggravation but to reduction of damages. Moreover, if the answers to Questions 7 and 8 could be viewed as inconsistent with the answer to Question 6, that inconsistency must be resolved to uphold the jury's only finding of damages in this case, and entry of judgment in the amount of $560,000 should be ordered. *See Gallick*, 372 U.S. 108; *Hager*, 2006 WL 3634373.

V. Neither *Sauer*, *Meyer*, nor *Rust* Support a Second Reduction of the Damage Award.

BNSF relies upon *Sauer v. Burlington N. Ry. Co.*, 106 F.3d 1490 (10th Cir. 1996), for the proposition that the Tenth Circuit Court of Appeals approved a second reduction of damages based on answers to pre-existing condition questions in a special verdict form. *Sauer*, however, reached no such result. The propriety of the verdict form was not at issue on appeal. *Sauer* addressed only whether the evidence supported an *instruction* on apportionment of damages. *Sauer* does not hold that the trial court was compelled to submit questions inquiring into the percentage of injuries attributable to pre-existing conditions and to then reduce the jury's damage award by that amount.

Cases upon which BNSF relies decided subsequent to *Sauer*, Opposition Brief at 7-9, are equally inapposite. *Meyer v. Union Pacific Rd. Co.*, 865 A.2d 857 (Pa. Super. Ct. 2004), dealt with jury *instructions* addressing apportionment, not special interrogatories. Nichols has never argued that the instructions given to the jury in this case regarding pre-existing conditions were inappropriate; rather, Nichols argues that the questions on the *verdict form* were improper, misleading, and erroneous and that FELA does not allow such post-verdict *reductions* under *Gallick* and *Ayers*.

Rust v. BNSF Ry. Co., 308 F. Supp.2d 1230 (D. Colo. 2003), presented a sufficiency of the evidence question in ruling on a motion in limine seeking to exclude pre-existing condition

evidence. Indeed, *Rust* explains that the railroad is entitled to present evidence of pre-existing conditions to enable the jury to correctly apportion damages in its "computation." *Id.* at 1231. In doing so, *Rust* recognizes that it is the role of the jury, not the judge, to determine the question of damages, and in the process must consider whether any pre-existing conditions were aggravated by the railroad's negligence.

CONCLUSION

The importance of the issue involved in this case to the uniform and efficient administration of FELA cases throughout the nation and the preservation of the right of all FELA claimants to trial by jury on all factual issues cannot be underestimated. Further, the issue is "beyond the academic or episodic." *Rice v. Sioux City Cemetary*, 349 U.S. 70, 74 (1955). If allowed to stand, the published opinion will have widespread and costly practical impact on the resources of state and federal courts and FELA litigants.

For the reasons stated above, and in his Petition for Writ of Certiorari, Nichols respectfully requests the Court to accept certiorari review to announce its own decision regarding the propriety of a trial court's double reduction of a FELA damage award based upon the answers to improper, confusing, and inconsistent questions contained in a special verdict form.

Respectfully submitted,

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